

**State of Hawaii**  
**Department of Transportation**  
**Disadvantaged Business**  
**Enterprise**  
**2021 Program Plan**  
(Revised 1/28/2022)



State of Hawaii  
Department of Transportation  
Office of Civil Rights  
200 Rodgers Boulevard  
Honolulu, Hawaii 96819

# Table of Contents

POLICY STATEMENT .....	3
Policy Statement Section 26.1 and 26.23.....	3
SUBPART A – GENERAL REQUIREMENTS .....	4
Objectives Section 26.1 .....	4
Applicability Section 26.3 .....	4
Definitions Section 26.5.....	4
Non-discrimination Requirements Section 26.7 .....	9
Record-Keeping Requirements Section 26.11 (a) .....	9
Bidders List Section 26.11 (c) .....	10
Retention of Records Section 26.11(d).....	10
Unified Certification Program (UCP) Information Section 26.11(e) .....	10
Federal Financial Assistance Agreement Section 26.13 .....	10
Assurances Section 26.13(a).....	10
Contract Assurance 26.13(b) .....	11
SUBPART B - ADMINISTRATIVE REQUIREMENTS .....	11
DBE Program Updates Section 26.21.....	11
Assignment of Responsibility Section 26.25 .....	12
DBE Financial Institutions Section 26.27.....	16
Prompt Payment Mechanisms Section 26.29 (a-d).....	16
Directory Section 26.31 (a).....	19
Overconcentration Section 26.33.....	19
Business Development Programs Section 26.35 .....	19
Monitoring Sub-recipients and Prime Contractors Section 26.37 (a).....	19
Monitoring and Enforcement Mechanisms Section 26.37(b).....	20
Running Tally Section 26.37(c).....	20
SUBPART C - GOALS, GOOD FAITH EFFORTS, AND COUNTING .....	21
Set-asides or Quotas Section 26.43.....	21
Overall Goals Section 26.45 .....	21
Shortfall Analysis Section 26.47 (c) .....	22
Transit Vehicle Manufacturers Section 26.49 .....	23
Contract Goals Section 26.51(d-g) .....	23
Good Faith Efforts (GFE) Procedures Section 26.53 .....	25

Counting DBE Participation Section 26.55(a).....	30
Commercially Useful Function (CUF) Section 26.55(c)(1) .....	34
SUBPART D – CERTIFICATION STANDARDS .....	35
Certification Process Section 26.61 - 26.73 .....	35
Business Size Section 26.65 .....	36
Social and Economic Disadvantage Section 26.67 .....	36
Ownership Section 26.69 .....	37
Control Section 26.71 .....	37
NAICS Codes Section 26.71(n)(1) .....	38
Other Rules Affecting Certification 26.73(a-h) .....	38
SUBPART E – CERTIFICATION PROCEDURES .....	38
Unified Certification Program Section 26.81 .....	38
Uniform Certification Application (UCA) Section 26.83 .....	38
On-Site Visit Section 26.83(c) .....	39
Notice of Certification Section 26.83 .....	39
Annual Affidavit of No Change Section 26.83(j) .....	40
Interstate Certification Section 26.85 .....	40
Denial of Initial Requests for Certification Section 26.86 .....	41
Removal of a DBE's Eligibility Section 26.87 .....	42
Summary Suspension of DBE Certification Section 26.88 .....	42
Certification Appeals Section 26.89 .....	43
Requests for Information .....	43
SUBPART F - MONITORING AND ENFORCEMENT .....	43
Information, Confidentiality, Cooperation Section 26.109 .....	43
ATTACHMENTS .....	44
Attachment A Title 49 Code of Federal Regulations, Part 26 .....	
Attachment B Hawaii Administrative Rules, Title 19, Subtitle 1, Administration Chapter 1 ....	
Attachment C Organizational Chart .....	
Attachment D Direct Access Memorandum .....	
Attachment E Small Business Utilization Plan .....	
Attachment F Informal Hearing Procedures .....	
Attachment G HDOT DBE Complaint Procedures and Form .....	

## POLICY STATEMENT

### Policy Statement Section 26.1 and 26.23


The Hawaii Department of Transportation (HDOT) established a Disadvantaged Business Enterprise (DBE) program in accordance with the U.S. Department of Transportation (USDOT), Title 49, Code of Federal Regulations, Part 26 (49 CFR Part 26) (Attachment A). As a recipient of Federal funds, HDOT is required to administer a DBE program in compliance with all laws, regulations, Executive Orders, and guidance. The Hawaii Administrative Rules, Title 19, Department of Transportation, Subtitle 1, Administration Chapter 1, "Participation in the Disadvantaged Business Enterprise Program" (Attachment B) implements the HDOT's DBE program pursuant to 49 CFR Part 26.

It is the policy of HDOT to ensure that DBEs as defined in 49 CFR Part 26 have an equal opportunity to receive and participate on USDOT-assisted contracts. It is also HDOT's policy:

1. To ensure nondiscrimination in the award and administration of USDOT-assisted contracts in the Department's highway, transit, and airport financial assistance programs;
2. To create a level playing field on which DBEs can compete fairly for DOT-assisted contracts;
3. To ensure that the HDOT's DBE program is narrowly tailored in accordance with applicable law;
4. To ensure that only firms that fully meet the eligibility standards are permitted to participate as DBEs;
5. To help remove barriers to the participation of DBEs in USDOT-assisted contracts;
6. To promote the use of DBEs in all types of federally assisted contracts and procurement activities conducted by recipients;
7. To assist the development of firms that can compete successfully in the marketplace outside the DBE program; and
8. To provide appropriate flexibility to recipients of Federal financial assistance in establishing and providing opportunities for DBEs.

The Director of Transportation is responsible for the implementation of this policy. The Office of Civil Rights (OCR), DBE Program Supervisor, is designated with the authority and overall responsibility to implement HDOT's DBE program on a day-to-day basis. Implementation of the DBE program is accorded the same priority as compliance with all other legal obligations incurred by HDOT in its financial assistance agreements with USDOT.

This policy statement shall be included in all contract provisions for federal aid projects and disseminated throughout HDOT and to DBE and non-DBE business communities that perform work on USDOT-assisted contracts.

  
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JADE T. BUTAY  
Director of Transportation

Jan 31, 2022  
\_\_\_\_\_  
Date

## SUBPART A – GENERAL REQUIREMENTS

### **Objectives Section 26.1**

The objectives are found in the policy statement on the first page of this program document.

### **Applicability Section 26.3**

HDOT is the recipient of Federal airport funds authorized by 49 U.S.C 47101, *et.seq.* As a recipient of Federal funds, HDOT is required to administer a DBE program in compliance with all laws, regulations, Executive Orders, and guidance.

HDOT is the recipient of Federal-aid highway funds authorized under Titles I and V of the Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA), Pub. L. 102-240, 105 Stat. 1914, Titles I, III, and V of the Transportation Equity Act for the 21st Century (TEA-21), Pub. L. 105-178, 112 Stat. 107, and the Safe, Accountable, Flexible, Efficient, Transportation Equity Act a Legacy for Users (SAFETA-LU), Pub. L 109-59.

HDOT is the recipient of Federal transit funds authorized by Titles I, III, V, and VI of ISTEA, Pub. L. 102-240 or by federal transit laws in Title 49, U.S. Code, or Titles I, II, and V of the TEA-21, Pub. L. 105-178.

### **Definitions Section 26.5**

*Affiliation* has the same meaning the term has in the Small Business Administration (SBA) regulations, 13 CFR Part 121.

- (1) Except as otherwise provided in 13 CFR Part 121, concerns are affiliates of each other when, either directly or indirectly:
  - (i) One concern controls or has the power to control the other; or
  - (ii) A third party or party's controls or has the power to control both; or
  - (iii) An identity of interest between or among parties exists such that affiliation may be found.
- (2) In determining whether affiliation exists, it is necessary to consider all appropriate factors, including common ownership, common management, and contractual relationships. Affiliates must be considered together in determining whether a concern meets small business size criteria and the statutory cap on the participation of firms in the DBE program.

*Alaska Native* means a citizen of the United States who is a person of one-fourth degree or more Alaskan Indian (including Tsimshian Indians not enrolled in the Metlakatla Indian Community), Eskimo, or Aleut blood, or a combination of those bloodlines. The term includes, in the absence of proof of a minimum blood quantum, any citizen whom a Native village or Native group regards as an Alaska Native if their father or mother is regarded as an Alaska Native.

*Alaska Native Corporation* (ANC) means any Regional Corporation, Village Corporation, Urban Corporation, or Group Corporation organized under the laws of the State of Alaska in accordance with the Alaska Native Claims Settlement Act, as amended (43 U.S.C. 1601, *et seq.*).

*Assets* mean all the property of a person available for paying debts or for distribution, including one's respective share of jointly held assets. This includes, but is not limited to, cash on hand and in banks, savings accounts, IRA or other retirement accounts, accounts receivable, life insurance, stocks and bonds, real estate, and personal property.

*Business, business concern or business enterprise* means an entity organized for profit with a place of business located in the United States, and which operates primarily within the United States or which makes a significant contribution to the United States economy through payment of taxes or use of American products, materials, or labor.

*Compliance* means that a recipient has correctly implemented the requirements of this part.

*Contingent Liability* means a liability that depends on the occurrence of a future and uncertain event. This includes, but is not limited to, a guaranty for debts owed by the applicant concerned, legal claims and judgments, and provisions for federal income tax.

*Contract* means a legally binding relationship obligating a seller to furnish supplies or services (including, but not limited to, construction and professional services) and the buyer to pay for them. For purposes of this part, a lease is considered to be a contract.

*Contractor* means one who participates, through a contract or subcontract (at any tier), in a USDOT-assisted highway, transit, or airport program.

*Days* mean calendar days. In computing any period of time described in this part, the day from which the period begins to run is not counted, and when the last day of the period is a Saturday, Sunday, or Federal holiday, the period extends to the next day that is not a Saturday, Sunday, or Federal holiday. Similarly, in circumstances where the recipient's offices are closed for all or part of the last day, the period extends to the next day on which the agency is open.

*Disadvantaged business enterprise or DBE* means a for-profit small business concern—

- (1) That is at least fifty-one (51) percent owned by one (1) or more individuals who are both socially and economically disadvantaged or, in the case of a corporation, in which fifty-one (51) percent of the stock is owned by one (1) or more such individuals; and
- (2) Whose management and daily business operations are controlled by one (1) or more of the socially and economically disadvantaged individuals who own it.

*USDOT-assisted contract* means any contract between a recipient and a contractor (at any tier) funded in whole or in part with USDOT financial assistance, including letters of credit or loan guarantees, except a contract solely for the purchase of land.

*Good faith efforts* mean efforts to achieve a DBE goal or other requirement of this part which, by their scope, intensity, and appropriateness to the objective, can reasonably be expected to fulfill the program requirement.

*Home state* means the state in which a DBE firm or applicant for DBE certification maintains its principal place of business.

*Immediate family member* means father, mother, husband, wife, son, daughter, brother, sister, grandmother, grandfather, grandson, granddaughter, mother-in-law, father-in-law, sister-in-law, brother-in-law, domestic partner, and civil unions recognized under state law.

*Indian tribe* means any Indian tribe, band, nation, or other organized group or community of Indians, including any ANC, which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians or is recognized as such by the State in which the tribe, band, nation, group, or community resides. See the definition of “tribally-owned concern” in this section.

*Joint venture* means an association of a DBE firm and one (1) or more other firms to carry out a single, for-profit business enterprise, for which the parties combine their property, capital, efforts, skills, and knowledge, and in which the DBE is responsible for a distinct, clearly defined portion of the work of the contract and whose share in the capital contribution, control, management, risks, and profits of the joint venture are commensurate with its ownership interest.

*Liabilities* mean financial or pecuniary obligations. This includes, but is not limited to, accounts payable, notes payable to banks or others, installment accounts, mortgages on real estate, and unpaid taxes.

*Native Hawaiian* means any individual whose ancestors were natives, before 1778, of the area which now comprises the State of Hawaii.

*Native Hawaiian Organization* means any community service organization serving Native Hawaiians in the State of Hawaii which is a not-for-profit organization chartered by the State of Hawaii that is controlled by Native Hawaiians, and whose business activities will principally benefit such Native Hawaiians.

*Noncompliance* means that a recipient has not correctly implemented the requirements of this part.

*Operating Administration or OA* means any of the following parts of USDOT: The Federal Aviation Administration (FAA), the Federal Highway Administration (FHWA), and the Federal Transit Administration (FTA). The “Administrator” of an operating administration includes his or her designees.

*Personal net worth* means the net value of the assets of an individual remaining after total liabilities are deducted. An individual's personal net worth does not include the individual's

ownership interest in an applicant or participating DBE firm; or the individual's equity in his or her primary place of residence. An individual's personal net worth includes only his or her own share of assets held jointly or as community property with the individual's spouse.

*Primary industry classification* means the North American Industrial Classification System (NAICS) designation which best describes the primary business of a firm. The NAICS is described in the *North American Industry Classification Manual—United States, 2017* which is available on the Internet at the U.S. Census Bureau website:  
<http://www.census.gov/eos/www/naics/>

*Primary recipient* means a recipient who receives USDOT financial assistance and passes some or all of it on to another recipient.

*Principal place of business* means the business location where the individuals who manage the firm's day-to-day operations spend most working hours and where top management's business records are kept. If the offices from which management is directed and where business records are kept are in different locations, the recipient will determine the principal place of business for DBE program purposes.

*Program* means any undertaking on a recipient's part to use USDOT financial assistance, authorized by the laws to which this part applies.

*Race-conscious* measure or program is focused specifically on assisting only DBEs, including women-owned DBEs.

*Race-neutral* measure or program is, or can be, used to assist all small businesses. For the purposes of this part, *race-neutral* includes gender-neutrality.

*Recipient* is any entity, public or private, to which USDOT financial assistance is extended, whether directly or through another recipient, through the programs of the FAA, FHWA, or FTA, or who has applied for such assistance.

*Secretary* means the Secretary of Transportation or his/her designee.

*Set-aside* means a contracting practice restricting eligibility for the competitive award of a contract solely to Small Business Enterprise (SBE) firms.

*Small Business Administration* or *SBA* means the United States Small Business Administration. *SBA certified firm* refers to firms that have a current, valid certification from or recognized by the SBA under the 8(a) BD or SDB programs.

*Small business concern* means, with respect to firms seeking to participate as DBEs in USDOT-assisted contracts, a small business concern as defined pursuant to section 3 of the Small Business Act and SBA regulations implementing it (13 CFR Part 121) that also does not exceed the cap on average annual gross receipts specified in §26.65(b).

*Small business enterprise or SBE* means a for-profit small business concern—

- (1) That is at least fifty-one (51) percent owned by one (1) or more individuals who are economically disadvantaged or, in the case of a corporation, in which fifty-one (51) percent of the stock is owned by one (1) or more such individuals; and
- (2) Whose management and daily business operations are controlled by one (1) or more economically disadvantaged individuals who own it.

*Small business enterprise or SBE race-neutral pilot program* means a small business utilization plan approved by FHWA for a period of one year, in which SBE contract goals replace race-conscious DBE contract goals, and contracts of the size and scope likely to be performed by an SBE are set aside for SBEs.

*Socially and economically disadvantaged individual* means any individual who is a citizen (or lawfully admitted permanent resident) of the United States and who is—

- (1) Any individual who a recipient finds to be a socially and economically disadvantaged individual on a case-by-case basis.
- (2) Any individual in the following groups, members of which are rebuttably presumed to be socially and economically disadvantaged:
  - (i) “Black Americans,” which includes persons having origins in any of the Black racial groups of Africa;
  - (ii) “Hispanic Americans,” which includes persons of Mexican, Puerto Rican, Cuban, Dominican, Central or South American, or other Spanish or Portuguese culture or origin, regardless of race;
  - (iii) “Native Americans,” which includes persons who are enrolled members of a federally or state-recognized Indian tribe, Alaska Natives, or Native Hawaiians;
  - (iv) “Asian-Pacific Americans,” which includes persons whose origins are from Japan, China, Taiwan, Korea, Burma (Myanmar), Vietnam, Laos, Cambodia (Kampuchea), Thailand, Malaysia, Indonesia, the Philippines, Brunei, Samoa, Guam, the U.S. Trust Territories of the Pacific Islands (Republic of Palau), the Commonwealth of the Northern Marianas Islands, Macao, Fiji, Tonga, Kiribati, Tuvalu, Nauru, Federated States of Micronesia, or Hong Kong;
  - (v) “Subcontinent Asian Americans,” which includes persons whose origins are from India, Pakistan, Bangladesh, Bhutan, the Maldives Islands, Nepal or Sri Lanka;
  - (vi) Women; and
  - (vii) Any additional groups whose members are designated as socially and economically disadvantaged by the SBA, at such time as the SBA designation becomes effective.

*Spouse* means a married person, including a person in a domestic partnership or a civil union recognized under State law.

*Transit vehicle manufacturer* means any manufacturer whose primary business purpose is to manufacture vehicles specifically built for public mass transportation. Such vehicles include but are not limited to: buses, rail cars, trolleys, ferries, and vehicles manufactured specifically for paratransit purposes. Producers of vehicles that receive post-production alterations or retrofitting

to be used for public transportation purposes (e.g., so-called cutaway vehicles, vans customized for service to people with disabilities) are also considered transit vehicle manufacturers.

Businesses that manufacture, mass-produce, or distribute vehicles solely for personal use and for sale “off the lot” are not considered transit vehicle manufacturers.

*Tribally-owned concern* means any concern at least fifty-one (51) percent owned by an Indian tribe as defined in this section.

*You* refers to a recipient unless a statement in the text of this part or the context requires otherwise (i.e., ‘You must do XYZ’ means that recipients must do XYZ).

## **Non-discrimination Requirements Section 26.7**

HDOT will never exclude any person from participation in, deny any person the benefits of, or otherwise discriminate against anyone in connection with the award and performance of any contract covered by 49 CFR Part 26 on the basis of race, color, sex, or national origin.

In administering its DBE program, HDOT will not, directly or through contractual or other arrangements, use criteria or methods of administration that have the effect of defeating or substantially impairing accomplishment of the objectives of the DBE program with respect to individuals of a particular race, color, sex, or national origin.

## **Record-Keeping Requirements Section 26.11 (a)**

HDOT will report DBE participation to USDOT as follows:

HDOT/Airports Division - Will submit annually the Uniform Report of Awards or Commitments and Payments to the FAA by December 1<sup>st</sup>.

HDOT/Statewide Transportation Planning Office (STPO) - Will report DBE participation for its own office, and the Oahu Metropolitan Planning Organization (OMPO) and Maui Metropolitan Organization (Maui MPO) on a semi-annual basis, using the Uniform Report of DBE Awards or Commitments and Payments to the FTA. Reports will be submitted by June 1<sup>st</sup> for the period covering October 1<sup>st</sup> to March 31<sup>st</sup> and by December 1<sup>st</sup> for the period covering April 1<sup>st</sup> to September 30<sup>th</sup>. These reports will reflect payments made to DBEs on USDOT-assisted contracts.

HDOT/ Office of Civil Rights - Will report DBE participation for the Highways Division Oahu Metropolitan Organization and Maui Metropolitan Planning Organization semi-annually on the Uniform Report of DBE Awards or Commitments and Payments to the FHWA. Reports will be submitted by June 1<sup>st</sup> for the period covering October 1<sup>st</sup> to March 31<sup>st</sup> and by December 1<sup>st</sup> for the period covering April 1<sup>st</sup> to September 30<sup>th</sup>. These reports will reflect payments made to DBEs after invoices are submitted by prime contractors and subcontractors on USDOT-assisted contracts.

### **Bidders List Section 26.11 (c)**

HDOT shall create a bidders list that contains information about all DBE and non-DBE firms that bid or quote on USDOT-assisted contracts. The purpose of this requirement is to allow the use of the bidders' list approach in calculating overall goals. The bidder's list will include the name, address, DBE/non-DBE status, NAICS codes, age, and range of annual gross receipts of firms. The list will include both successful and unsuccessful bidders.

HDOT will collect this information in the following ways:

1. A bidder's registration requirement will be included in bid documents.
2. Bidder Registration Form shall be available on the HDOT DBE website and must be submitted to HDOT's Office of Civil Rights, DBE program, via U.S. mail, facsimile, e-mail, or in person.

### **Retention of Records Section 26.11(d)**

HDOT shall retain the complete certification package, affidavits of no-change, change notices, and on-site reviews indefinitely. HDOT will retain other documents related to the certification file for a period of five (5) years.

### **Unified Certification Program (UCP) Information Section 26.11(e)**

The HDOT, Office of Civil Rights is the sole certifying agency for the state of Hawaii. A Hawaii UCP agreement was signed by all direct recipients and sub-recipients in 2013 which outlines HDOT's role as the certifying agency and the responsibilities of the UCP's members.

By January 1<sup>st</sup> of each year, HDOT shall report to the USDOT Office of Civil Rights, the percentage and location in the State of certified DBE firms in the UCP Directory controlled by women, socially and economically disadvantaged individuals other than women, and individuals who are women and are otherwise socially and economically disadvantaged individuals.

### **Federal Financial Assistance Agreement Section 26.13**

HDOT has signed the following assurances, applicable to all USDOT-assisted contracts and their administration:

#### **Assurances Section 26.13(a)**

HDOT shall not discriminate on the basis of race, color, national origin, or sex in the award and performance of any USDOT-assisted contract or in the administration of its DBE Program or the requirements of 49 CFR Part 26. HDOT shall take all necessary and reasonable steps under 49 CFR Part 26 to ensure nondiscrimination in the award and administration of USDOT-assisted contracts. HDOT's DBE program, as required by 49 CFR Part 26 and as approved by USDOT, is incorporated by reference in this agreement. Implementation of this program is a legal obligation and failure to carry out its terms shall be treated as a violation of this agreement.

Upon notification to HDOT of its failure to carry out its approved program, HDOT may impose sanctions as provided for under Part 26 and may, in appropriate cases, refer the matter for enforcement under 18 U.S.C. 1001 and/or the Program Fraud Civil Remedies Act of 1986 (31 U.S.C. 3801 *et seq.*).

This language will appear in financial assistance agreements with sub-recipients.

### **Contract Assurance 26.13(b)**

HDOT will ensure that the following clause is placed in every USDOT-assisted contract and subcontract:

“The contractor, sub-recipient, or subcontractor shall not discriminate on the basis of race, color, national origin, or sex in the performance of this contract. The contractor shall carry out applicable requirements of 49 CFR Part 26 in the award and administration of USDOT-assisted contracts. Failure by the contractor to carry out these requirements is a material breach of this contract, which may result in the termination of this contract or such other remedy as the recipient, deems appropriate, which may include, but is not limited to:

1. Withholding monthly progress payments;
2. Assessing sanctions;
3. Liquidated damages; and/or
4. Disqualifying the contractor from future bidding as non-responsible.”

## **SUBPART B - ADMINISTRATIVE REQUIREMENTS**

### **DBE Program Updates Section 26.21**

HDOT will continue to carry out this program until all funds from USDOT financial assistance have been expended. HDOT lets USDOT-assisted contracts and have political subdivisions that fall within the following USDOT categories:

1. All FHWA recipients receiving funds authorized by a statute to which this part applies;
2. FTA recipients receiving planning, capital, and/or operating assistance who will award prime contracts (excluding transit vehicle purchases) exceeding \$250,000 in FTA funds in a Federal fiscal year; and
3. FAA recipients receiving grants for airport planning or development who will award prime contracts exceeding \$250,000 in FAA funds in a Federal fiscal year.

All HDOT’s sub-recipients and local public agencies that award Federal funds must comply with HDOT’s DBE program and may not have a plan independent of HDOT. HDOT will provide USDOT updates when there are significant changes in the program.

## **Assignment of Responsibility Section 26.25**

The following responsibilities shall be applicable to both the DBE program and the SBE pilot program.

Director of Transportation (Director):

The Director has the overall responsibility for HDOT, which includes general oversight of the DBE program.

Civil Rights Coordinator (CRC):

HDOT's CRC serves as the chief staff officer to the Director and is responsible for overseeing and administering HDOT's civil rights programs which include, the DBE, Americans with Disabilities Act (ADA), Title VI (of the Civil Rights Act of 1964)/Environmental Justice, and Equal Employment Opportunity/Affirmative Action (EEO/AA) programs.

DBE Liaison Officer (DBELO):

The Director has overall responsibility for HDOT and has delegated the responsibility of the DBELO to the DBE Program Supervisor. An organizational chart displaying the DBELO's position in the organization is found in Attachment C to this program. The DBELO of the OCR has direct access to the Director (Attachment D).

The DBELO is responsible for implementing all aspects of the DBE program and ensuring that HDOT complies with all provisions of 49 CFR Part 26. The DBELO is supervised by the CRC within the OCR.

The DBE program office has a staff of four (4) including the DBELO, a DBE Program Specialist, Equal Opportunity Coordinator for the Highways Division, and a DBE Program Certifier, to assist in the administration of the program. The duties and responsibilities of the DBELO include, but are not limited to the following:

1. Gathers, reviews, and reports statistical data and other information as required by USDOT;
2. Reviews and approves divisions' overall goals;
3. Ensures that bid notices and requests for proposals are available to DBEs in a timely manner;
4. Advises the Director on DBE matters and achievement;
5. Chairs meetings of the DBE Advisory Committee;
6. Plans and participates in DBE training seminars;
7. Coordinates and conducts training for field personnel, project managers, consultants acting on behalf of HDOT, sub-recipients, and other staff with DBE responsibilities on requirements such as but not limited to, monitoring Commercially Useful Function (CUF), goal setting, good faith efforts (GFE), and prompt payment provisions;

8. Coordinates and conducts training in cooperation with the divisions, for contractors, consultants, DBEs, and other stakeholders on topics such as but not limited to, DBE regulatory requirements for bidders, project goals, GFE, CUF, and prompt payment provisions;
9. Certifies DBEs according to the criteria set by USDOT and acts as a liaison to the UCP in the State of Hawaii;
10. Provides outreach to DBEs and minority and women business organizations to assist DBEs with contracting opportunities and to help foster relationships with larger prime bidders/contractors. Such outreach activities may include, but shall not be limited to, networking workshops, small business fairs, business development training sessions, bonding education programs, and mentor-protégé programs;
11. Conducts audits of prime contractors to ensure prompt payment requirements are met;
12. Monitors compliance of sub-recipients; and
13. Maintains HDOT's bidder's list and DBE directory.

The DBELO contact information is provided below:

Hawaii Department of Transportation  
Office of Civil Rights  
200 Rodgers Boulevard  
Honolulu, Hawaii 96819  
Phone: 808-831-7914  
Fax: 808- 831-7944  
TTY: 808- 808-831-7931  
Email: HDOT-DBE@hawaii.gov

DBE Program Specialist:

The duties and responsibilities of the DBE Program Specialist include, but are not limited to the following:

1. Assists the DBELO in the development and evaluation of the DBE program;
2. Provides outreach to DBEs, non-DBE firms, and other groups to help small businesses grow and to foster DBE participation;
3. Develops and implements the DBE Supportive Services program to assist DBEs in contracting opportunities in highway-related federal projects;
4. Researches develops, implements, and monitors special projects, such as those that will increase DBE utilization, remove barriers to DBE participation, and assist in the development of DBEs to participate in the marketplace outside the DBE program;
5. Develops, plans, and participates in DBE training seminars and outreach that may include providing technical assistance to DBEs, and disseminating information on available business opportunities;
6. Creates and maintains a bidders list; and
7. Assist the DBELO with compliance reviews of sub-recipients.

#### DBE Program Certifier:

The DBE Program Certifier shall be the principal certifier for the HDOT and shall be responsible for the following:

1. Provides assistance to firms seeking DBE certification in accordance with eligibility criteria set forth by USDOT;
2. Determines initial and continued eligibility by reviewing the DBE program Uniform Certification Application (UCA), Personal Net Worth Statement, and other supporting documents through the Certification Management and Contract Compliance online system, conducting on-site reviews and evaluating other available information;
3. Maintains and updates the statewide DBE Directory of certified firms;
4. Investigates DBE related complaints and challenges; and
5. Conducts training on certification criteria and procedures on an as-needed basis.

#### Contracts Officer:

The Contracts Officer shall implement procedures to facilitate DBE participation in federally-assisted HDOT projects. These procedures include, but are not limited to the following:

1. Arranges for solicitations, time for the presentation of bids, quantities, specifications, and delivery schedules to facilitate the participation of DBEs;
2. Disseminates information on contracting procedures and specific contracting opportunities in a timely manner;
3. Works closely with the DBELO to ensure that all DBE requirements are contained in all federal-aid contracts, and that project goal is specified when applicable; and
4. Communicate with the project managers, construction management consultants, and other HDOT staff regarding updates on DBE-related forms.

#### DBE Coordinators:

The duties of the DBE Coordinator for the Highways Division transferred to OCR effective August 2021. Pursuant to the new organizational chart, the Highways Division DBE Coordinator reports to the DBELO.

The HDOT Airports Division, STPO and HDOT's sub-recipients (i.e. Local Public Agencies) each have a DBE Coordinator assigned to manage, monitor, and provide technical assistance on DBE program activities. The duties and responsibilities of the DBE Coordinators include, but are not limited to the following:

1. Coordinates the day-to-day DBE compliance activities in their respective divisions/offices.
2. Establishes overall goals, and submits them to the respective operating administration upon review and approval by the DBELO;
3. Sets contract goals on federal-aid projects, as appropriate, based on bid estimates made by project engineer;

4. Prepares and submits reports via the DBELO to their respective operating administrations which include:
  - a. DBE goals, raw data utilized in the goal calculation, and a narrative description of the methodology used in establishing goals, shortfall analysis, and corrective action plan when an overall goal is not met; and
  - b. Semi-annual (FHWA/FTA) and annual (FAA) Uniform Report of DBE Awards or Commitments and Payments.
5. Assists the DBELO with ensuring that work committed to DBEs are performed by DBEs by:
  - a. Reviewing all federal-aid contracts and subcontracts to ensure that work committed to DBEs is specified in the contract and that DBEs are performing a CUF;
  - b. Analyzes HDOT's and its sub-recipient's progress toward attaining DBE goals by maintaining a running tally of payments to DBE and non-DBE subcontractors;
  - c. Disseminating information from the DBELO regarding changes in the DBE regulations to project managers, construction managers, and other HDOT staff; and
  - d. Providing training with the assistance of the DBELO to project managers, and field personnel on DBE compliance requirements such as, but not limited to, GFE, prompt payment provisions, retainage, and CUF.
6. Establishes and maintains a record-keeping system that:
  - a. Documents DBE affirmative action efforts of the division;
  - b. Identifies and implements procedures adopted by the division in compliance with the requirements of the DBE program, compares projected DBE goals with actual accomplishments, and lists efforts to identify and locate DBEs; and
  - c. Contains all DBE-related correspondence, reports, materials, publications, etc.
7. Evaluates GFE of low bidders that do not meet the project goal, and makes recommendations to the division administrator regarding the award of the contract based on GFE;
8. Provides information and other assistance to DBEs;
9. Attends pre-bid meetings;
10. Develops affirmative action programs and procedures to facilitate DBE participation in federal-aid projects; and
11. Monitors ongoing projects to ensure that the contract provisions for DBE participation and prompt payment are in compliance with applicable laws, rules, and regulations, and to ensure actual participation of DBEs on awarded contracts. Tracks ongoing payments to subcontractors by prime contractors through the Certification and Contract Compliance Management System (online tracking system). Informs project engineers/managers if there are any delays in payment as noted in the online tracking system.

#### Project Managers:

The duties and responsibilities of project managers shall include, but shall not be limited to the following:

1. Calculates project goals in collaboration with a goal-setting committee by reviewing the scope of the project, type of work to be performed by the prime contractor and

subcontractors, and estimating the value of subcontracts that may potentially be performed by DBEs;

2. Attends pre-bid meetings to inform contractors of subcontracting opportunities for DBEs, if any;
3. Attends pre-construction meetings to discuss terms and conditions of the contract;
4. Reviews contracts and subcontracts using the Subcontract Verification Log to ensure that DBE assurances and other required documents are included;
5. Review contracts and subcontracts to ensure that DBEs are performing work as specified in the subcontract and that they are serving a CUF;
6. Assists the DBELO through the DBE Coordinators by arranging for inspections by field personnel to monitor CUF of DBEs;
7. Ensures that prime contractors comply with HDOT's prompt payment provisions, by requiring prime contractors to timely report payments to subcontractors via the online tracking system if the contract was awarded after November 2017, or via the DBE Participation and Prompt Payment Certification form for contracts awarded prior to November 2017;
8. Assists OCR with notifying prime contractors of noncompliance of prompt payment provision and documents non-compliance in project diary and weekly construction meeting minutes
9. Reviews all written requests by prime contractors to replace or substitute DBEs on a project and approves such actions only for good cause;
10. Prior to project closeout, works with OCR to determine if DBE contract goal was met, and if not, work with OCR to gather evidence of good faith efforts prior to final payment; and
11. Monitors the use of joint checks in accordance with the aforementioned procedure manuals to ensure that the use of such checks does not compromise the independence of the DBE.

Legal Counsel:

The Deputy Attorney General from the Department of the Attorney General, Land/Transportation Division, will provide legal assistance to the OCR.

### **DBE Financial Institutions Section 26.27**

It is the policy of HDOT to investigate the full extent of services offered by financial institutions owned and controlled by socially and economically disadvantaged individuals in the community, to make reasonable efforts to use these institutions and to encourage prime contractors on USDOT-assisted contracts to make use of these institutions.

### **Prompt Payment Mechanisms Section 26.29 (a-d)**

All prompt payment provisions and processes as stated in this section shall apply to the SBE race-neutral pilot program during the period in which the SBE pilot program is in effect.

HDOT utilizes an online payment tracking system to monitor payments from prime contractors to all subcontractors and suppliers. There are older projects that are not tracked in the online payment system, and hard copy progress payments are provided to OCR via email from district offices and LPAs to monitor payments and maintain a running tally to track goal attainment.

After the progress payment is approved at the district level, the project manager shall forward the progress payment to OCR and the respective divisions' fiscal office. For projects entered into the online tracking system, OCR shall ensure that the prime contractor reports payment from HDOT or LPA and reports the timely payment to subcontractors and suppliers. For projects not in the online tracking system, OCR shall ensure that the DBE Participation and Prompt Payment Certification form accompanies the progress payment and shall review payment information accordingly.

For each contract tracked in the Certification and Contract Compliance Management System, DBE staff shall randomly select a payment to a subcontractor or supplier and will conduct an audit by requesting the invoice from the subcontractor or supplier and the corresponding canceled check from the prime contractor or subcontractor (if multiple tiers exist) to ensure that payment was made as reported. HDOT DBE staff shall do this for each contract, and may select multiple payments and/or multiple audit months per contract if deemed appropriate. The decision to request documents for multiple payments and/or multiple audit months will depend on whether the prime contractor has a history of late payments or a track record of general noncompliance with DBE requirements.

With respect to retainage, HDOT elected to utilize the second method of 49 CFR Part 26, §26.29(b)(2) which states, "You may decline to hold retainage from prime contractors and require a contract clause obligating prime contractors to make prompt and full payment of any retainage kept by prime contractor to the subcontractor within thirty (30) days after the subcontractor's work is satisfactorily completed."

Although the DBE regulations require full payment of retainage within thirty (30) days after satisfactory completion of work, Hawaii Revised Statutes Section 103.10-5 requires payment to a contractor, including retainage, within ten (10) days. HDOT, therefore, includes the following clause verbatim in each USDOT-assisted prime contract:

"The Contractor shall pay all subcontractors within ten (10) calendar days after receipt of any progress payments from the Department. This clause applies to both DBE and non-DBE subcontractors, and all tiers of subcontracts.

The Contractor will verify that payment or retainage has been released to the subcontractors or its suppliers within the specified time through entries in the Department's online tracking system during the corresponding monthly audits. Prompt payment will be monitored and enforced through the Contractor's reporting of payments to its subcontractors and suppliers in the online tracking system.

Subcontractors, including lower-tier subcontractors and/or suppliers, will confirm the timeliness and the payment amounts received utilizing the online tracking system. Discrepancies will be investigated by the respective DBE Coordinator and the project engineer. Payments to the

subcontractors, including lower-tier subcontractors, and including retainage released after the subcontractor or lower-tier subcontractor's work has been accepted, will be reported by the Contactor or the subcontractor.

When any subcontractor has satisfactorily completed its work as specified in the subcontract, and there are no bona fide disputes, the bidder shall make prompt and full payment to the subcontractor of all monies due, including retainage, within ten (10) calendar days after the subcontractor's work is satisfactorily completed. A subcontractor's work is satisfactorily completed when all the tasks called for in the subcontract have been accomplished and documented, as required by HDOT. The bidder must obtain prior written approval from HDOT before it can continue to withhold retainage from any subcontractor who has completed its portion of the work. This clause applies to both DBE and non-DBE subcontractors, and all tiers of subcontracts."

In the event, a subcontractor has failed to satisfactorily perform work as specified in the subcontract, and there is a dispute which may result in a delay of payment to the subcontractor, the prime contractor shall notify the project manager in writing as soon as practicable. The project manager shall work with the prime contractor and subcontractor to resolve the issues related to the dispute. When the dispute is resolved to the satisfaction of both parties, the prime contractor shall pay the subcontractor within ten (10) days from the date the dispute is resolved. HDOT's procedures regarding the release of retainage shall be contained within the contract provisions relating to DBE requirements. Language regarding the prompt release of retainage by prime contractors to subcontractors shall be clearly specified in all prime contracts.

HDOT's contract provisions specify that failure to comply with the DBE requirements, including prompt payment provisions, maybe a material breach of contract and may result in termination of the contract or some other remedy as deemed appropriate by HDOT.

HDOT shall implement sanctions for violations of the prompt payment provision. Prime contractors will be charged with a violation when it is determined that delayed payments (i.e. more than 10 days after the prime contractor received payment) were made to subcontractors/suppliers on a contract. The violation shall be contract-specific, which means that one violation could account for multiple delayed payments on the same contract. The following sanctions shall be imposed for each violation:

1. 1<sup>st</sup> and 2<sup>nd</sup> violations – prime contractor shall be issued a letter of reprimand.
2. Three or more violations – prime contractor shall be suspended from all new work for ninety (90) calendar days for each violation. "New work" means bidding on new projects. Violations shall be enforced consecutively.

## Complaints

Complaints regarding the alleged failure to satisfy prompt payment requirements shall be addressed in accordance with the Complaint Procedures attached hereto in Appendix G of this Program Plan. For FAA-funded contracts, covered complaints received by HDOT shall be reported to the FAA Administrator within 30 days of receipt by HDOT.

### **Directory Section 26.31 (a)**

HDOT maintains a directory identifying all firms eligible to participate as DBEs. The directory lists the firm's name, address, phone number, and type of work the firm has been certified to perform as a DBE unless the DBE chooses to withhold personal and/or business information. The DBE Directory is housed on the Certification and Contract Compliance Management System, and the link is posted on the HDOT/DBE webpage at <http://hidot.hawaii.gov/administration/ocr/dbe/dbe-directory/>.

### **Overconcentration Section 26.33**

HDOT has not determined that over-concentration exists in the types of work that DBEs perform. However, if the issue of overconcentration arises, the DBELO may initiate some of the following actions upon approval from USDOT:

1. Work with prime contractors to find and use DBEs in other industry areas.
2. Discontinue assigning a goal on a contract that offers work in the concentrated field.
3. Establish a business development program such as a mentor-protégé program, to assist DBEs in performing work outside of the specified field that HDOT has determined to have an overconcentration of DBE participation.

Allegations or determinations of overconcentration shall be reported to the appropriate operating administration.

### **Business Development Programs Section 26.35**

HDOT is committed to continuing its Business Development Program (BDP), entitled *HI-Way 2 Success*, to assist DBEs to grow and compete in the federal contracting arena. To achieve this, HDOT has secured DBE Supportive Services (DBE/SS) funds from the FHWA.

### **Monitoring Sub-recipients and Prime Contractors Section 26.37 (a)**

**Sub-recipients:** Sub-recipients of USDOT funds shall comply with DBE program requirements and shall utilize this Program Plan to implement their respective programs. HDOT shall conduct semi-annual meetings with sub-recipients to provide training, updates to the DBE regulations, and other information pertinent to the DBE program. The DBELO or his/her designee shall conduct an annual review of all sub-recipients to ensure compliance with HDOT's DBE program.

**Prime Contractors:** Prime contractors will be monitored to ensure that appropriate subcontracts are executed and that all assurances and requirements related to the DBE program are contained in each subcontract.

HDOT will require prime contractors to maintain records and documents of payments to DBEs for three (3) years following the performance of the contract. These records will be made

available for inspection upon request by an authorized representative of HDOT or USDOT. This reporting requirement also extends to any certified DBEs subcontractor.

### **Monitoring and Enforcement Mechanisms Section 26.37(b)**

HDOT will implement the following monitoring and enforcement mechanisms to ensure compliance with 49 CFR Part 26:

1. HDOT will bring to the attention of USDOT any false, fraudulent, or dishonest conduct in connection with the program so that USDOT can take the steps (e.g., referral to the Department of Justice for a criminal prosecution, referral to the USDOT Inspector General, action under suspension and debarment or Program Fraud and Civil Penalties rules) provided in 26.109;
2. HDOT will adopt a monitoring and enforcement mechanism to verify that work committed to DBEs at contract award is actually performed by DBEs. Bidders will sign the bid proposal that includes language which states that bidders shall utilize DBEs listed in their bid/proposal;
3. Pre-construction meetings with the prime contractor shall be required to discuss the scope of work and performance expectations on contracts and subcontracts, and to confirm that work committed to DBEs shall be subcontracted to such DBEs;
4. Field inspections shall be conducted to ensure that DBEs are performing a CUF. Project Engineer (or their designee) shall monitor the worksite and shall complete the CUF DBE Commercially Useful Function Onsite Review Form – Contractors and DBE Commercially Useful Function Onsite Review Form – Manufacturer and Regular Dealer/Supplier (hereafter referred collectively as DBE CUF Onsite Review Forms) when interviewing DBEs on the job to ensure that they are performing a CUF. Inspectors shall do this for all DBEs on the project. The DBE CUF Onsite Review Forms serve as HDOT's written certification that DBEs are performing a commercially useful function and that work committed to DBEs are actually being performed by DBEs;
5. On an annual basis, HDOT shall review the DBE policies and practices of its sub-recipients to ensure that they are in compliance with 49 CFR, Part 26; and
6. HDOT DBE program staff shall provide training to its line staff and sub-recipients when significant changes occur to the Program Plan which may affect the monitoring and enforcement mechanisms described in this section and other DBE program requirements.
7. In an effort to decrease fraud and abuse in the DBE Program, HDOT has implemented a DBE complaint procedure (Attachment G). All complaints can be anonymous; however, if an individual provides contact information, HDOT can handle the complaint more thoroughly. HDOT will not investigate vague, ambiguous, or elusive complaints. HDOT will not investigate complaints where it is the respondent of the complaint. These complaints will be forwarded to the appropriate USDOT operating administration for investigation.

### **Running Tally Section 26.37(c)**

HDOT shall maintain a running tally of payments to DBEs to track contract goal attainment on projects with project goals. DBE Coordinators within each division shall track progress

payments maintained by the project managers through the online payment tracking system. For HDOT and LPA projects not in the online payment tracking system, DBE staff shall request progress payment information via email or other acceptable communication from the project and/or construction managers.

HDOT shall report to FHWA a running tally of payments on federal-aid highway projects on a monthly basis. DBE staff shall submit the running tally report within sixty days after the report month. For example, the running tally for the month of August shall be submitted by October 31<sup>st</sup>. Additionally, to comply with the requirements set forth in the semi-annual DBE Uniform Report of Awards or Commitments and Payments, OCR staff shall search the Highways Division project database, Socrata, to ensure all projects in which payments were made during the reporting period are recorded.

### **Fostering Small Business Participation Section 26.39**

In accordance with §26.39 of the DBE Regulations, HDOT developed a Small Business Utilization Plan to incorporate a small business element into the DBE Program Plan to facilitate participation by small businesses on federal-aid contracts. As part of this Small Business Utilization Plan, HDOT established an SBE pilot program as a race-neutral means to encourage participation by DBEs. The SBE program is comprised of SBE contract goal setting and an SBE set-aside program. The Small Business Utilization Plan detailing the SBE program is attached hereto as Exhibit E.

The SBE pilot program was approved by FHWA in May 2021 as part of HDOT's overall goal and methodology. Upon approval of this DBE Program Plan by FHWA, the SBE pilot program will commence and will be in effect until May 2022, unless extended. HDOT shall assess the success of the SBE pilot program and will determine if the race-neutral program shall continue, or whether race-conscious contract goals will be reinstated to increase DBE participation.

## **SUBPART C - GOALS, GOOD FAITH EFFORTS, AND COUNTING**

### **Set-asides or Quotas Section 26.43**

HDOT shall not impose quotas or have set-asides for DBEs in its federal-aid contracting. As part of the SBE pilot program, SBE race-neutral set-asides shall be implemented as part of HDOT's Small Business Utilization Plan pursuant to §26.39.

### **Overall Goals Section 26.45**

HDOT submits three (3) separate overall goals to FAA, FHWA, and FTA. Each operating administration requires HDOT to submit their overall goal by August 1<sup>st</sup> on a triennial basis. The following table outlines a schedule of overall goals for each operating administration:

<b>Operating Administration</b>	<b>Triennial Period</b>	<b>Goal Due Date</b>
FAA Large/Medium Hubs	FFY 2020-2022	August 1, 2019
FAA Non-Hubs	FFY 2022-2024	August 1, 2021
FAA Small Hubs	FFY 2021-2023	August 1, 2020
FHWA	FFY 2020-2022	August 1, 2022
FTA	FFY 2021-2023	August 1, 2020

Prior to submitting the overall goal to the respective operating administration, HDOT shall consult with minority, women, and general contractor groups, and community organizations to obtain information concerning the availability of disadvantaged and non-disadvantaged businesses. At least one (1) face-to-face meeting shall be scheduled to discuss the effects of discrimination on the opportunities for DBEs, and HDOT's efforts to establish a level playing field for participation by DBEs.

The proposed goal for each operating administration shall be posted to HDOT's DBE website: <https://hidot.hawaii.gov/administration/ocr/dbe/> prior to submission to the operating administration on August 1<sup>st</sup>. Further, HDOT shall solicit comments on, and shall make available for inspection, the overall goal and rationale for 30 days prior to submission. If the goal is revised by the operating administration, HDOT will post the revised goal to its website.

The proposed goals, a summary of public comments, and HDOT's responses to said comments will be submitted to each USDOT operating administration. Additionally, HDOT will provide a description of the methodology used to obtain the goals, including an explanation of how the base figures were obtained, and any adjustments to such figures to the respective operating administrations. Mid-term adjustments may be performed if market trends change significantly, DBE participation is either very high or low during the fiscal year, or for other reasons that may warrant an adjustment.

### **Shortfall Analysis Section 26.47 (c)**

If HDOT does not meet its overall goal at the end of any Federal fiscal year, HDOT shall conduct an analysis to determine the reasons for the shortfall, take corrective steps, and will identify milestones to improve and increase DBE participation in the following Federal fiscal year.

The analysis will include reviewing the DBE awards and commitments for the year to determine if appropriate race-neutral and race-conscious measures were taken to foster DBE participation. The analysis shall also include identifying the types of work that were contracted or subcontracted during the review period, to determine if there is a sufficient number of ready, willing, and able DBEs to perform the identified work. If there are insufficient amounts of DBEs available for a certain type of work, HDOT shall actively recruit small disadvantaged businesses to become certified DBEs. This will be done by reviewing the bid proposal's Subcontractor Listing of bidders to determine if non-DBE subcontractors are potentially certifiable DBEs.

HDOT shall also provide training to its staff and DBE stakeholders (i.e. prime contractors, subcontractors, DBEs, and potential DBEs) on contract goals, GFE, and other areas of the DBE program, with the intent of increasing DBE participation in the next fiscal year.

### **Transit Vehicle Manufacturers Section 26.49**

HDOT shall require each transit vehicle manufacturer (TVM) to certify that It has complied with the requirements of §26.49 and all applicable DBE requirements, as a condition of being authorized to bid or propose on FTA-assisted transit vehicle procurements. Such procurements shall not be counted in HDOT's overall FTA DBE goal.

Only those TVMs listed on FTA's certified list of Transit Vehicle Manufacturers or that have submitted a goal methodology to FTA that has been approved or has not been disapproved at the time of solicitation are eligible to bid.

All transit vehicle purchases and remanufacture work shall be from an FTA-certified TVM. If non-TVM vehicles are purchased, or DBE TVMs are not available, HDOT shall include such contracts in the triennial FTA overall goal, or as a project-specific goal.

HDOT shall submit within 30 days of making an award, the name of the successful bidder, and the total dollar value of the contract in the manner prescribed in the grant agreement

### **Contract Goals Section 26.51(d-g)**

The following procedure describes the DBE and SBE goal-setting process. HDOT shall set DBE contract goals on federal-aid construction and professional services contracts when it is determined that subcontracting opportunities may exist. HDOT shall also set contract goals on projects that HDOT believes are of the size and scope that DBEs may compete for as prime contractors.

HDOT shall set SBE contract goals to encourage the participation of all small businesses during the pilot program. HDOT believes that since all DBEs will qualify as SBEs, this race-neutral program shall be sufficient to meet HDOT's overall DBE goal. At the conclusion of the SBE pilot program, HDOT shall conduct a review of the SBE program to determine if there is an increase in DBE participation. If DBE attainment did not increase to a satisfactory level, HDOT shall reinstate race-conscious DBE contract goals. The following section outlines the procedures for setting contract goals and shall apply to both SBE and DBE contract goals.

For each federal-aid project with potential subcontracting opportunities, HDOT shall convene a goal-setting committee comprised of the project engineer, DBELO, divisional DBE Coordinator, and a representative from the respective operating administration (if available). The committee will review the engineer's estimate, nature of work on the project, and shall determine if there are qualified DBEs that may potentially perform portions of the work. Based on this review, a project goal shall be set for DBE participation. Once the contract is awarded, the project goal, which may be adjusted upwards if the winning bidder obtains more DBE participation than proposed by HDOT, becomes the contract goal.

**Contract Goals on Design-Build Projects** – HDOT shall set contract goals on design-build contracts in the following manner. First, HDOT will require the design-build contractor to submit a DBE Performance Plan with its qualifications proposal. The Plan shall include the following elements:

1. A policy statement signed by Design-Build Contractor's Authorized Representative, which express Design-Build Contractor's commitment to utilize DBEs in all aspects of the work, outlines the various levels of responsibilities, and states the objectives of the DBE's Performance Plan. The Design-Build Contractor shall obtain the written commitment of all Design-Build Contractor entities to comply with and advance the intent of the policy statement.
2. A description of proposed activities to facilitate DBE engagement in work as Subcontractors and Subconsultants shall include, at a minimum, the following:
  - a. Participate in a Department-sponsored networking event with prospective DBEs that may be ready, willing, and able to perform work on this project;
  - b. Conduct bid item-specific outreach meetings in coordination with the Department for DBE firms to highlight appropriate subcontracting opportunities;
  - c. Solicit statements of qualification, proposals, and/or price quotations from qualified DBE firms and arrange a time for the review of the qualifications, plans, quantities, specifications, and delivery schedules and for the preparation and presentation of proposals and/or price quotations;
  - d. Encourage eligible DBEs to apply for certification with the Department by the Design and Price Proposal due date;
  - e. Contact minority and women business organizations, contractor associations, and city agencies with programs for disadvantaged individuals for assistance in recruiting and encouraging eligible DBE contractors to apply for certification with the Department; and
  - f. Develop an action plan to monitor ongoing DBE participation on the project to ensure the Design-Build Contractor is on track to meet the DBE contract goal. The action plan shall include, but is not limited to, regularly scheduled meetings with the Department to address issues that may affect committed DBEs, such as a reduction in the scope of work, and when GFE is necessary to replace a DBE for good cause.
3. The Performance Plan must include planned DBE participation, which may not identify specific DBEs, but generally describes work that may be done by DBEs and an estimated amount that will be performed.

At the time the Design-Build Contractor submits its design and price proposal, the Contractor will be required to submit its DBE documentation, including DBE information, nature of each DBE's work, and estimated bid amounts to demonstrate that it has met the goal, or has made GFE to meet the goal. If the Design-Build Contractor meets these requirements, points shall be awarded in accordance with the evaluation criteria for the design-build project.

## **Good Faith Efforts (GFE) Procedures Section 26.53**

### Demonstration of GFE Section 26.53(a) & (c)

The good faith efforts requirement as set forth in §26.53 of the DBE Regulations shall apply to SBE and DBE contract goals. The HDOT shall include these procedures and any subsequent updates to these provisions, in the contract provisions relating to DBE requirements.

When a project goal is not met, a GFE review committee comprised of the affected division's DBE Coordinator, operating administration representative (if available) and the DBELO, shall conduct the initial review of GFE submitted by the bidder/offeree. The GFE review committee shall determine whether the bidder/offeree has performed the quality, quantity, and intensity of efforts that demonstrate a reasonably active and aggressive attempt to meet the contract goal in accordance with 49 CFR Part 26, Appendix A.

The bidder/offeree bears the responsibility of demonstrating that it met the contract goal, or if the contract goal was not met, by documenting the GFE it made in an attempt to meet the goal.

The bidder/offeree shall be required to document all actions taken to meet the contract goal. GFE by the bidder/offeree to meet the contract goal may include, but are not limited to, the following actions:

1. Whether the bidder/offeree solicited through all reasonable and available means (e.g. attendance at meetings, advertising, and/or written notices) the interest of all certified DBEs who have the capability to perform part or all of the work to be included under the contract. HDOT will also consider whether the bidder/offeree solicited the participation of potential DBEs insufficient time to allow the DBEs to properly inquire about the project and respond to the solicitation, and will also review whether the bidder/offeree took appropriate steps to follow up with interested DBEs in a timely manner to facilitate participation by DBEs in the project;
2. Whether the bidder/offeree identified and broke up portions of work that can be performed by DBEs in order to increase the likelihood that DBEs would be able to participate, and the DBE goal could be achieved (e.g. breaking out contract items into economically feasible units to facilitate DBE participation, even when the bidder/offeree might otherwise prefer to perform these work items with its own forces);
3. Whether the bidder/offeree made available or provided interested DBEs with adequate information about the plans, specifications, and requirements of the project in a timely manner, and assisted them in responding to the bidder's/offeree's solicitation;
4. Whether the bidder/offeree negotiated in good faith with interested DBEs. Evidence of such negotiations includes documenting: a) the names, addresses, and telephone numbers of DBEs that were contacted by the bidder/offeree; b) a description of the information that was provided to DBEs regarding the plans and specifications; and c) detailed explanations for not utilizing individual DBEs on the project. The fact that there may be additional or higher costs associated with finding and utilizing DBEs are not, by themselves, sufficient reasons for a bidder's/offeree's refusal to utilize a DBE, or the

failure to meet the DBE goal, provided that such additional costs are not unreasonable. Also, the ability or desire of a bidder/offeror to perform a portion of the work with its own forces, that could have been undertaken by an available DBE, does not relieve the bidder/offeror of the responsibility to make GFE to meet the DBE goal, and to make available and solicit DBE participation in other areas of the project to meet the DBE goal;

5. Whether the bidder/offeror rejected DBEs as being unqualified without sound reasons, or based on a thorough investigation of their capabilities. The DBE's standing within the industry, membership in specific groups, organizations, or associations, and political or social affiliation, are not legitimate bases for the rejection or non-solicitation of bids from particular DBEs;
6. Whether the bidder/offeror made efforts to assist interested DBEs in obtaining bonding, lines of credit, or insurance;
7. Whether the bidder/offeror made efforts to assist interested DBEs in obtaining necessary equipment, supplies, materials, or related assistance or services; and
8. Whether the bidder/offeror effectively used the services of available minority/women community organizations, minority/women/small business groups, contractors' groups, local, state, and federal minority/women/small business assistance offices, or other organizations to provide assistance in recruitment and placement of DBEs.

It is the sole responsibility of the bidder/offeror to submit any and all documents, logs, correspondence, and any other records or information to HDOT that will demonstrate that the bidder/offeror made GFE to meet the DBE goal. Additionally, for each DBE that was contacted but not utilized by the bidder/offeror for a contract, the bidder/offeror shall submit a detailed written explanation for each DBE detailing the reasons for the bidder's/offeror's failure or inability to utilize or to allow the DBE to participate in the contract. Further, when a bidder selects a non-DBE over a DBE subcontractor, documentation of GFE must include quotes of each DBE and non-DBE subcontractor submitted to the bidder for work on the contract. In its GFE evaluation, HDOT shall also consider the following as part of its evaluation:

1. Compare the bidder's/offeror's bid against the bids of other bidders/offerors on the same project, and compare the DBEs and DBEs' work areas utilized by the bidder/offeror with the DBEs listed in other bids submitted for the contract. If other bidders obtained DBE participation in a particular work area in which the low bidder did not, the committee shall take this into consideration in its evaluation;
2. Verify contacts by bidders/offerors with DBEs; and
3. Compare the DBE and the categories of DBE work targeted by the bidder/offeror for participation in the contract, with the total pool of DBEs available for each particular subcontract targeted by the bidder.

#### Information Necessary to Evaluate Good Faith Efforts Section 26.53(b)

In order to be considered responsible, each solicitation for which a contract goal has been established will require the bidders/offerors to submit the Confirmation and Commitment Agreement and Contract Goal Verification and Good Faith Efforts Documentation form by the close of business (i.e. 4:30 p.m. HST) five (5) days of bid opening, which contain the following information to evaluate GFE:

1. The names and addresses of DBE firms that will participate in the contract;
2. A description of the work that each DBE will perform and all North American Industry Classification System (NAICS) codes describing the type of work the firm is certified under by HDOT;
3. The dollar amount of each DBE and non-DBE subcontractor, supplier, trucking company or service provider participating in the project;
4. Written and signed documentation of commitment by the bidder/offeror to use DBEs whose participation it submits to meet a contract goal;
5. Written confirmation by the DBE that it is participating on the contract in the type, and amount of work provided in the bidder's/offeror's commitment;
6. Quotes for both DBE and non-DBE subcontractors when a non-DBE is selected over a DBE for the project.

Failure to submit the above information by close of business (i.e. 4:30 p.m. HST) five (5) days of bid opening will result in bid rejection.

Administrative Reconsideration of Good Faith Efforts Section 26.53(d)

Within five (5) working days of being informed by HDOT's Director or his/her designee that the bidder/offeror is has not documented sufficient GFE, a bidder/offeror may request administrative reconsideration. Bidders/offerors should make this request in writing to the following official:

Director of Transportation  
Hawaii Department of Transportation  
869 Punchbowl Street, Room 509  
Honolulu, Hawaii 96813

The Director or his designee shall not have played any role in the original determination that the bidder/offeror did not document sufficient GFE.

As part of this reconsideration, the bidder/offeror will have the opportunity to provide written documentation concerning the issue of whether it met the goal or made adequate GFE to do so. The bidder/offeror will have the opportunity to meet in person with the reconsideration official, or his/her designee, to discuss the issue of whether it met the goal or made adequate GFE to do so.

In an administrative reconsideration, HDOT may consider whether other bidders/offerors are able to meet the contract goal, as HDOT will review all previously submitted documents, oral and written arguments, and other evidence presented in the reconsideration, in making its decision. If additional information is required, the bidder/offeror shall have five (5) working days to submit the requested information to the reconsideration official.

The Director of Transportation or his designee shall inform the bidder/offeror in writing of HDOT's reconsideration decision within thirty (30) days of the proceeding. The decision will state HDOT's findings with respect to whether or not the bidder/offeror met the contract goal, or

whether or not the bidder/offeror exhibited GFE to achieve the contract goal. The reconsideration decision is not administratively appealable to USDOT but is appealable under HRS 103D-709.

#### Replacement of a DBE on a Contract Section 26.53(f) and (g)

HDOT will require a contractor to make GFE to replace a DBE that is terminated or has otherwise failed to complete its work on a contract with another certified DBE, to the extent needed to meet the contract goal. HDOT will require the prime contractor to promptly provide written notice to the project manager of the DBE's inability or unwillingness to perform and provide reasonable documentation.

The written notice by the contractor must include the following:

1. The date the contractor determined that the certified DBE is unwilling, unable or ineligible to perform work on the contract;
2. The projected date that the contractor shall require substitution or replacement DBE to commence work if consent is granted by HDOT;
3. Documentation of facts that cite specific actions or inactions on the part of the affected DBE that led to the contractor's conclusion that the DBE is unwilling, unable, or ineligible to perform work on the contract;
4. A brief statement of the affected DBE's capacity and ability or inability to perform the work as determined by the contractor;
5. Documentation of contractor's GFE to enable the affected DBE to perform the work;
6. The current percentage of work completed on each bid item by the affected DBE;
7. The total dollar amount currently paid per bid item for work performed by the affected DBE;
8. The total dollar amount per bid item remaining to be paid to the DBE for work completed but for which the DBE has not received payment, and with which the contractor has no dispute; and
9. The total dollar amount per bid item remaining to be paid to the DBE for work completed for which the DBE has not received payment, and with which the contractor and DBE have a dispute.

The prime contractor shall send a copy of the written notice to replace a certified DBE on a contract to the affected DBE. The affected DBE may submit a written response to the prime contractor's notice within five (5) calendar days to HDOT and shall explain to the prime contractor and HDOT the reasons, if any, it objects to the termination. HDOT's project managers shall consult the DBELO and obtain approval from the respective Division Administrator or designee before terminating or substituting a DBE.

No substitution or termination of a DBE shall be made at any time without the prior written consent of HDOT. Written consent shall be provided only if the prime contractor has demonstrated good cause, as determined by HDOT, to terminate the DBE. Good cause may include, but is not limited to the following circumstances:

1. The DBE fails or refuses to execute a written contract;

2. The listed DBE fails or refuses to perform the work of its subcontract in a way consistent with normal industry standards;
3. The listed DBE fails or refuses to meet the prime contractor's reasonable, nondiscriminatory bond requirements;
4. The listed DBE becomes bankrupt, insolvent, or exhibits credit unworthiness;
5. The listed DBE is ineligible to work on public works projects because of suspension and debarment proceedings pursuant to 2 CFR Parts 180, 215, and 1,200 or applicable state law;
6. HDOT has determined that the listed DBE is not a responsible contractor, trucking company, or service provider;
7. The listed DBE voluntarily withdraws from the project and provides to HDOT written notice of its withdrawal;
8. The listed DBE is ineligible to receive DBE credit for the type of work required; and
9. A DBE owner dies or becomes disabled with the result that the listed DBE is unable to complete its work on the contract.

#### Proposed Substitution of a Certified DBE Section 26.53(f)

Upon termination of the certified DBE, the prime contractor shall make GFE to replace the terminated DBE. The termination of the DBE does not relieve the prime contractor of meeting the DBE contract goal, and the unpaid portion of the terminated DBE's contract shall not be credited towards the DBE contract goal.

When a DBE substitution is necessary, the prime contractor shall submit to HDOT in writing the name of another certified DBE firm, the proposed work to be performed, and the dollar amount of the work to replace the unfulfilled portion of the work of the originally committed DBE firm. The prime contractor shall furnish information such as the contract number, project number, bid item, item description, bid unit and quantity, unit price, and total price.

If the prime contractor is unable to commit the remaining required dollar value to the substitute DBE, the prime contractor shall provide written evidence of GFE made to obtain the remaining required dollar value. HDOT's project managers, in coordination with the DBELO, shall review the GFE made by the prime contractor for sufficiency in accordance with HDOT's GFE Procedures.

If the contractor fails or refuses to comply in the time specified, HDOT's contracting office will issue an order stopping all or part of payment/work until satisfactory action has been taken. If the contractor still fails to comply, the contracting officer may issue a termination or a default proceeding.

#### Determining Good Faith Efforts of DBE Prime Contractors Section 26.53(i)

HDOT shall allow credit for DBE contractors for work performed with its own forces plus all DBE subcontractors, trucking companies, and service providers at every tier. DBE prime contractors shall not receive credit for work subcontracted to non-DBEs. If DBE prime

contractors that are DBEs do not meet the goal, the GFE procedures described above shall be applied.

#### Review of DBE Subcontracts Section 25.53(j)

HDOT shall require prime contractors to make available all subcontracts and agreements to ensure compliance with DBE's requirements. Highways Division shall utilize a Subcontract Verification Log to document reviews of subcontracts by project management staff.

#### Change Orders Section 26.53(g)

When there is a significant change order to a contract, HDOT shall, on a case-by-case basis, analyze the GFE of the contractor to maintain the existing DBE contract goal. However, there may be circumstances when the goal may be altered, such as when the change order significantly impacts the scope of work on the contract.

#### Evaluation of GFE Prior to Project Closeout §26.53

The above GFE procedures also apply when determining whether or not the prime contractor met the DBE goal at the end of the project. If the prime contractor did not meet the DBE goal, then the prime contractor must demonstrate that it made GFE meet the goal prior to the issuance of final payment. Further, if the prime contractor did not obtain sufficient DBE participation to meet the goal and did not demonstrate GFE, sanctions relative to GFE shall be imposed.

#### Non-Compliance With GFE Procedures

HDOT shall implement sanctions for violations of the GFE procedures. Bidders will be charged with a violation when it is determined that GFE was not made to secure the participation of DBEs when actively bidding on a project. Additionally, sanctions shall be imposed when prime contractors fail to comply with GFE procedures after the execution of the contract. Bidders or prime contractors shall be assessed one violation per project, irrespective of the number of incidents that occur on a specific project. The following sanctions shall be imposed per violation:

1. 1<sup>st</sup> and 2<sup>nd</sup> violations –bidder or prime contractor shall be issued a letter of reprimand.
2. Three or more violations – bidder or prime contractor shall be suspended from all new work for ninety (90) calendar days for each violation. "New work" means bidding on new projects. Violations shall be enforced consecutively.

#### **Counting DBE Participation Section 26.55(a)**

DBE participation on contract goals shall be counted as follows:

1. The entire amount of work actually performed by DBEs on all tiers of a contract to include the cost of materials and supplies obtained or equipment leased by DBEs (except from the prime contractor or its affiliate);

2. One hundred (100) percent of the cost of materials that are obtained from DBE manufacturers;
3. Sixty (60) percent of the cost of materials that are purchased from DBE regular dealers; and
4. The commissions or fees for transactions with DBE suppliers who are not manufacturers or regular dealers.

Credit towards contract goals shall not be allowed until payment is made to DBE firms. CUF shall be reviewed on a project-by-project basis.

***[FAA Funding Recipients Only]***

Pursuant to Sec. 150 of the FAA Reauthorization Act of 2018, firms that exceed the business size standard in § 26.65(b) will remain eligible for DBE certification and credit on FAA-funded projects as long as they do not exceed the small business size standard, as adjusted by the United States Small Business Administration, for the NAICS code(s) in which they are certified.

Joint Ventures Section 26.55(b)

HDOT shall assess the clearly defined, distinct portion of work performed by the DBE in the joint venture. Credit shall be granted to DBEs participating in a joint venture for their portion of work on the contract.

Trucking Firms Section 26.55(d)

DBE trucking firms shall be counted as follows:

1. The total value of the transportation services of a certified DBE trucker if the DBE trucker uses trucks it owns, insures, and operates using drivers it employs;
2. The total value of the transportation services if a DBE trucker leases trucks from another DBE firm;
3. The value of the fees, commission or mark up from a lease arrangement if a DBE trucker leases trucks from a non-DBE firm and credit is not allowed for the lease amount;
4. The total value of the transportation services provided by a non-DBE lessee, not to exceed the value of transportation services provided by DBE-owned trucks on the contract. For additional participation by non-DBE lessees, credit will be awarded only for the fee or commission the DBE firm receives as a result of the lease arrangement. EXAMPLE: DBE firm X uses two of its own trucks on a contract, leases two trucks from DBE Firm Y and six trucks from non-DBE Firm Z. DBE credit would be awarded for the total value of transportation services provided by Firm X and Firm Y, and may also be awarded for the total value of transportation services provided by four of the six leased trucks provided by Firm Z. In all, full credit would be allowed for the participation of eight trucks. With respect to the other two leased trucks provided by Firm Z, DBE credit could be awarded only for the fees or commissions pertaining to those trucks Firm X receives as a result of the lease with Firm Z;

5. The DBE may lease trucks without drivers from a non-DBE truck leasing company. If the DBE leases trucks from a non-DBE truck leasing company and uses its own employees as drivers, it is entitled to credit for the total value of these hauling services. EXAMPLE: DBE Firm X uses two (2) of its own trucks on a contract. It leases two (2) additional trucks from non-DBE Firm Z. Firm X uses its own employees to drive the leased trucks. DBE credit would be awarded for the total value of the transportation services provided by all four (4) trucks; and
6. For purposes of determining whether a trucking firm performs a CUF, a lease must indicate that the DBE has exclusive use of and control over the truck. This does not preclude the leased truck from working for others during the term of the lease with the consent of the DBE, so long as the lease gives the DBE absolute priority for use of the leased truck. Leased trucks must display the name and identification number of the DBE.

#### Regular Dealers 26.55(e)(2)(i)

For materials and supplies purchased from a regular dealer, sixty (60) percent of the cost of such materials and supplies shall be counted towards the DBE goal. A regular dealer is a firm that owns, operates, or maintains a store, warehouse, or other establishments in which the materials, supplies, articles, or equipment of the general character described by the specifications and required under the contract are bought, kept in stock, and regularly sold or leased to the public in the usual course of business.

To be a regular dealer, the firm must be an established, regular business that engages, as its principal business and under its own name, in the purchase and sale or lease of the products in question.

A person may be a regular dealer in such bulk items as petroleum products, steel, cement, gravel, stone, or asphalt without owning, operating, or maintaining a place of business if the person both owns and operates distribution equipment for the products. Any supplementing of regular dealers' own distribution equipment shall be by a long-term lease agreement and not on an ad hoc or contract-by-contract basis.

#### Decertified DBEs Section 26.55(f) and (g)

If a prime contractor makes a commitment to using an ineligible DBE or HDOT committed to using an ineligible DBE prime contractor prior to issuance of a subcontract or contract, credit may not be applied to either the overall or contract goal. The prime contractor must find an eligible DBE to meet the contract goal, or demonstrate that it has made GFE to meet the goal.

If the replacement DBE is a non-listed subcontractor subject to the listing requirement of HRS 103D.302, the DBE special provisions shall prevail, such that HDOIT shall allow the non-listed subcontractor to perform work on the contract of the size and scope sufficient to meet the DBE contract goal.

If a prime contractor has executed a subcontract with the firm before the notice of ineligibility, the prime contractor may continue to use the DBE firm on the contract and may continue to

receive credit toward its DBE contract goal for the firm's work but the remaining portion of work by the ineligible DBE subcontractor subsequent to the notice of ineligibility may not count towards the overall goal.

When HDOT has let a prime contract to the DBE that was later ruled ineligible, the portion of the ineligible firm's performance of the contract remaining after the issuance of the notice shall not count toward the DBE overall goal but may count toward the DBE contract goal.

If a DBE firm becomes ineligible solely because it has exceeded the business size standard during the performance of the contract, HDOT shall continue to count its participation on that contract towards HDOT's overall goal, as well as the contract goal.

The HDOT shall provide written notice of a decertification to:

1. HDOT Contracts Officer;
2. HDOT Airports Division DBE Coordinator;
3. HDOT Highways Division DBE Coordinator;
4. City & County of Honolulu, Department of Transportation Services Planner;
5. City & County of Honolulu, Honolulu Authority for Rapid Transportation Staff;
6. STP OMPO and Maui MPO DBE Coordinators; and
7. Hawaii County, Maui County and Kauai County DBE Coordinators.

#### Suspended DBEs Section 26.88(f) (g)(h)

While suspended, the DBE may not be considered to meet a contract goal on a new contract, and any work it does on a contract received during the suspension shall not be counted toward HDOT's overall goal. The DBE may continue to perform under an existing contract executed before the DBE received a Notice of Suspension and may be counted toward the contract goal during the period of suspension as long as the DBE is performing a CUF under the existing contract.

If the suspended DBE believes it is no longer eligible, it may voluntarily withdraw from the program, in which case no further action is required. If the DBE believes that its eligibility should be reinstated, it must provide HDOT information demonstrating that the firm is eligible notwithstanding its changed circumstances. Within thirty (30) days of receiving this information, HDOT's DBE Liaison Officer must either lift the suspension and reinstate the firm's certification or commence a decertification action under §26.87 of this part. If HDOT commences a decertification proceeding, the suspension remains in effect during the proceeding.

While HDOT's initial decision to suspend the DBE is not appealable, if HDOT fails to either lift the suspension and reinstate the firm or commence a decertification proceeding the firm may appeal to the U.S. Department of Transportation under §26.89, as a constructive decertification.

## **Commercially Useful Function (CUF) Section 26.55(c)(1)**

HDOT shall include provisions relating to the CUF of DBE firms, and any subsequent updates to these provisions, in the contract provisions relating to DBE requirements.

HDOT shall monitor CUF of all DBE firms on federal-aid projects by taking the following steps:

1. Review prime contracts and subcontracts to determine the scope of work that the DBE firms are contracted to provide;
2. Perform site inspections on the job site using the DBE CUF Onsite Review Form;
3. Review documents such as payroll, invoices, and delivery tickets; and
4. Provide written certification that CUF requirements have been met.

### **Review of Scope of Work**

HDOT shall review all prime contracts, including prime contracts between Local Public Agencies and prime contractors, and all subcontracts. HDOT shall evaluate the amount of work subcontracted to the DBE, industry practices, whether the amount the firm is to be paid under the contract is commensurate with the work it is actually performing, and the DBE credit claimed for its performance of the work, and other relevant factors. The DBE must perform at least thirty (30) percent of the work with its own forces.

HDOT OCR staff shall attend all pre-construction meetings and will review the CUF process with prime contractors, subcontractors, and project management staff. Within thirty (30) days of contract award, OCR shall communicate in writing to prime contractors regarding their responsibility to ensure all DBEs perform a CUF.

### **Site Inspections**

A CUF review shall be conducted for each DBE on federal-aid projects utilizing the DBE CUF Onsite Review Form. CUF reviews shall be conducted by the construction engineer or her/his designee when the DBE is actively engaged in their scope of work. The CUF review should be conducted when the DBE begins work on the project or as soon as records/documents are available to conduct a thorough CUF review (e.g., at least two payrolls).<sup>1</sup> Additional reviews may be necessary depending on the size, duration, and complexity of the project. Project managers or his/her designee shall utilize the HDOT CUF Onsite Review Forms to perform the review and shall provide a copy of the completed CUF Onsite Review Forms to OCR within fourteen (14) days of completion.

### **Document Review**

HDOT shall review documents such as certified payroll, invoices, and delivery tickets associated with the work performed by the DBE to ensure that CUF and payment requirements have been met.

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## Written Certification

HDOT project manager, or his/her designee shall sign the appropriate DBE CUF Onsite Review Forms to certify that the DBE has performed a CUF. The certified CUF review is required in order for the prime contractor to receive credit towards the contract goal. HDOT may not report payments on the semi-annual Uniform Report of Awards, Commitments and Payments unless CUF reviews are completed for the project.

## CUF Compliance Reviews

To prevent fraud and misuse of DBEs, OCR shall select federal-aid projects to conduct compliance reviews using a risk-based approach. In determining which projects to be reviewed, OCR shall examine the size and scope of the project, whether the prime contractor has a history of non-compliance with CUF and/or prompt payment requirements, and the frequency in which DBEs have been terminated or replaced by the prime contractor in comparison to other prime contractors on similar projects.

## Non-Compliance

Prime contractors are responsible to ensure that DBEs perform a CUF. When it is determined that a DBE did not perform a CUF, the prime contractor shall be found in non-compliance. Each violation shall represent the sum of one or more incidents of CUF non-compliance on any given contract. The following sanctions shall be imposed per violation:

1. 1<sup>st</sup> and 2<sup>nd</sup> violations – prime contractor shall be issued a letter of reprimand.
2. Three or more violations – prime contractor shall be suspended from all new work for ninety (90) calendar days for each violation. “New work” means bidding on new projects. Violations shall be enforced consecutively.

When a DBE is presumed not to be performing a CUF, the DBE may present evidence to rebut this presumption. Decisions regarding CUF determinations are subject to review by concerned operating administrations, such as the FHWA. However, CUF decisions are not appealable to USDOT, they are contract administration issues.

## SUBPART D – CERTIFICATION STANDARDS

### **Certification Process Section 26.61 - 26.73**

HDOT will use the certification standards of Subpart D of Part 26 to determine the eligibility of firms to participate as DBEs in USDOT-assisted contracts. To be certified as a DBE, a firm must meet all certification eligibility standards. HDOT will make all certification decisions based on the facts taken as a whole.

The certification standards of this section shall also apply to SBEs, with the exception of group membership. SBEs are not required to be socially disadvantaged in accordance with §26.67.

## **Burden of Proof and Group Membership Section 26.61 and 26.63**

HDOT shall not require DBE applicants to provide evidence of social disadvantage such as a birth certificate, unless there is reason to believe that the applicant does not belong to the identified presumptively disadvantaged group. For example, if a Caucasian male indicates that he is Native Hawaiian but physically appears to be Caucasian, HDOT staff will ask for the applicant's birth certificate. When Native Americans claim tribal affiliation, HDOT shall request evidence of enrollment in a federal or state-recognized Indian tribe.

When HDOT determines that a DBE applicant does not belong to a group presumed to be disadvantaged (i.e. Asian Pacific American, Subcontinent Asian American, African American, Hispanic American, Native American, and Women), such applicants must provide evidence of individual disadvantage. HDOT shall utilize the DBE regulations, Appendix E, Individual Determinations of Social and Economic Disadvantage in order to assess, on a case-by-case basis, whether or not the DBE applicant is disadvantaged on an individual basis.

## **Business Size Section 26.65**

HDOT shall certify firms that are existing small businesses, as defined by the Small Business Administration (SBA) standards. Even if eligible firms certified for purposes of working on FHWA and FTA funded contracts meet the requirements of 26.65 (a), HDOT will not certify a firm (including its affiliates), in any given Federal fiscal year, whose average gross receipts over the firm's previous three (3) fiscal years, exceed \$26.29 million.

HDOT shall use the SBA's definition of affiliation found in 13 CFR, Part 121 when calculating a DBE firm's and its affiliates' gross receipts.

## **Social and Economic Disadvantage Section 26.67**

To determine economic disadvantage, HDOT shall accept the USDOT's Personal Net Worth (PNW) form without modification. HDOT shall require all DBE applicants whose ownership and control of the firm are relied upon for DBE certification to complete the PNW form. Such individuals must certify that their PNW does not exceed \$1.32 million and must submit a notarized statement with appropriate supporting documents.

When analyzing the PNW form and supporting documents, HDOT shall only calculate the individual's share of assets and liabilities. HDOT may ask for additional information on a case-by-case basis, in situations such as, but not limited to, when assets have been transferred to a spouse, a non-disadvantaged spouse is still involved in the firm, or HDOT deems the additional information necessary to analyze the accumulation of substantial wealth.

When determining the PNW of an individual owner, HDOT shall:

1. Exclude an individual's ownership interest in the applicant firm;
2. Exclude the individual's equity in his or her primary residence; and

3. Exclude taxes and penalties of retirement plans that would accrue if the asset were distributed at the present time.

## **Ownership Section 26.69**

In order for a firm to be certified as a DBE, the firm must be fifty-one (51) percent owned by socially and economically disadvantaged individuals. In order for a firm to be certified as an SBE, the firm must be fifty-one (51) percent owned by economically disadvantaged individuals. HDOT will review the business structure of each firm to determine ownership by socially and/or economically disadvantaged individuals as follows:

1. **Corporation** – Must own at least fifty-one (51) percent of each class of voting stock outstanding and fifty-one (51) percent of the aggregate of all stock outstanding.
2. **Partnership** – Must own fifty-one (51) percent of each class of partnership interest. Such ownership must be reflected in the firm's Partnership Agreement.
3. **Limited Liability Company** – Must own at least fifty-one (51) percent of each class of member interest.

All firms will be required to provide evidence of contributions of capital, such as canceled checks and other bank records. Documents to be submitted for review will vary depending on the business structure, and will include, but shall not be limited to, Articles of Incorporation, By-laws, stock certificates, stock ledgers, Partnership Agreements, and Operating Agreements.

## **Control Section 26.71**

In addition to owning at least fifty-one (51) percent of the DBE firm, socially and economically disadvantaged individuals must also demonstrate control of the firm, and must be the highest-ranking officer, such as the Chief Executive Officer or President of the company.

In addition to owning at least fifty-one (51) percent of the SBE firm, economically disadvantaged individuals must also demonstrate control of the firm, and must be the highest-ranking officer, such as the Chief Executive Officer or President of the company.

DBE firms must be an independent business and may not be reliant upon other non-DBE businesses to be viable. HDOT shall scrutinize a firm's relationships with non-DBE firms with respect to recent employee/employer relationships, personnel, facilities, equipment, and bonding/financial support, to ensure that DBEs are independent.

Evidence to determine control will depend on the business structure of the DBE firm. HDOT shall review documents, including, but not limited to, Articles of Incorporation, Corporate By-laws, Operating Agreements, Shareholder Agreements, Partnership Agreements, Employee/Employer Agreements, resumes, minutes from meetings of the board of directors, bank signature cards, and schedule of salaries.

HDOT shall review the application, and conduct an on-site visit to determine, among other things, who manages the day-to-day operations, makes managerial and financial decisions that

impact the firm, negotiates contracts, markets the firm, hires and fires personnel, and controls the board of directors.

The State of Hawaii does not require a business owner to hold a professional or vocational license to own a firm. However, DBE firms must employ a licensed individual in order to work on HDOT prime contracts, and subcontracts when appropriate.

### **NAICS Codes Section 26.71(n)(1)**

HDOT shall review the DBE application for new firms to determine the most narrowly defined NAICS codes for the firm. In addition, HDOT shall review capability statements, company websites, resumes, licenses, certifications, and other evidence to determine the most appropriate NAICS codes to use.

When a certified DBE requests to add NAICS codes, HDOT shall request evidence that supports the request for additional codes, such as licenses, letters of reference from prime contractors, and list of completed projects.

### **Other Rules Affecting Certification 26.73(a-h)**

HDOT shall utilize the certification standards outlined in Subpart D of the DBE regulations, and shall not base its certification eligibility determinations on whether or not a firm performs a CUF, or whether it meets the definition of a regular dealer. Moreover, HDOT shall base certification decision on present circumstances and shall not refuse to certify a firm based solely on historical information that may disqualify the firm, such as lack of ownership or control.

Additionally, DBE applicant firms may be a newly formed business with no profits and need not pre-qualify to work on federal aid projects as a criterion for certification.

## **SUBPART E – CERTIFICATION PROCEDURES**

### **Unified Certification Program Section 26.81**

HDOT is a participant of the State of Hawaii Unified Certification Program (UCP) and performs all DBE certifications for the Hawaii UCP. HDOT is responsible for meeting all of the requirements of this section. Other participants of the UCP, which include HDOT's sub-recipients, and other direct recipients of USDOT funds, such as the City and County of Honolulu, and the Honolulu Authority for Rapid Transportation, utilize the DBE Directory created and maintained by HDOT for their respective DBE programs.

### **Uniform Certification Application (UCA) Section 26.83**

HDOT purchased B2GNow software in April 2016 to maintain a certification management system, and to accept online applications. The online version of the UCA elicits the same information as the hard copy of the UCA in the DBE regulations. All applications, Annual

Affidavits of No Change, and supporting documents, including PNW statements will be accepted electronically.

Information submitted by a firm in the application package is provided under penalty of perjury of the laws of the United States and shall be accurate as of the application date. Firms may be terminated from the program or a contract if any misrepresentations in the application package are discovered. The applicant may also be subject to prosecution under Federal and/or state perjury laws.

HDOT will review the application package for completeness and may request other pertinent data. The applicant shall provide the data within thirty (30) days, and may request an extension of this thirty (30) daytime period, either orally or in writing.

HDOT will make a certification decision based on the facts taken as a whole. HDOT shall determine an applicant firm's eligibility based on the available information provided by the firm, within ninety (90) days of receipt of all pertinent data. This period may be extended for good cause.

### **On-Site Visit Section 26.83(c)**

Except as otherwise provided, an on-site visit shall be conducted for all firms applying for certification. The DBE Program Certifier, or other designated personnel, will conduct the on-site visit.

The on-site visit will assist in establishing the accuracy of the statements provided in the UCA and will help to verify that the firm actually possesses the equipment and expertise necessary to operate the business. In this regard, HDOT will obtain a list of equipment owned or available to the firm and verify possession of any licenses held by the firm or its key personnel to perform the required work. The DBE Program Certifier or designated staff will interview the owner of the firm, who should be the highest-ranking officer, review the resumes of the relevant officers and in the case of corporations, analyze stock ownership.

An on-site visit shall be scheduled following a desk review of the DBE application package. The on-site visit will be conducted at the firm's principal place of business, and/or job site(s) that the firm may be working on at the time of the eligibility review.

On-site visits shall not be conducted for out-of-state firms. HDOT shall request the on-site reports from the DBE's home state.

### **Notice of Certification Section 26.83**

The DBE Program Certifier or designated staff shall determine the eligibility of the DBE applicant firm. HDOT will provide written notification of this determination to the applicant. The DBE will receive a certificate and a letter which lists the type of work the firm has been certified to perform, applicable NAICS codes, and information on annual updates. The letter

also outlines the firm's responsibility to immediately report any changes that may impact its DBE eligibility.

### **Certification Reviews Section 26.83(a)(b)(c)**

HDOT shall not require firms to reapply for certification as long as the DBE continues to meet the eligibility requirements to remain certified. HDOT shall conduct a certification review, including an on-site visit of the firm, if there is a significant change in the firm's disadvantaged or business status, business size, ownership or control that may impact a firm's continued eligibility.

When a certification review is warranted the UCP shall make a determination of eligibility within ninety (90) days after receipt of the documents required to conduct a certification review. This time period may be extended for good cause. The firm shall receive written notification of eligibility similar to that received during initial certification. The certification will remain in effect until such time that it is determined that the firm no longer meets the requirements to be certified as a DBE.

### **Annual Affidavit of No Change Section 26.83(j)**

HDOT requires all DBEs to provide an Annual Affidavit of No Change in which the DBE business owner declares under penalty of perjury that no changes have occurred in the firm's circumstances that affect business size, disadvantaged status, ownership, or control and that their firm continues to meet the business size standards to remain eligible. To determine the business size, HDOT shall request federal corporate tax returns to calculate the gross receipts of the DBE firm to ensure that the three-year average of gross receipts does not exceed the business size cap for the type of work that the DBE performs.

DBEs are required to report any change in circumstances affecting its ability to meet business size standards, disadvantaged status, ownership, or control criteria of 49 CFR Part 26, or of any material changes to the information provided to HDOT within thirty (30) days of the change.

### **Interstate Certification Section 26.85**

HDOT strives to alleviate the certification burden of DBEs certified in another state. Out-of-state firms will be required to submit the application package provided and approved by their home state, and sign an affidavit attesting that the application is accurate. HDOT shall also request any Affidavits of No Change, and certification reviews conducted subsequent to the firm's initial certification. The home state's on-site report will be requested and reviewed with the complete application package. If the on-site report is older than three (3) years, HDOT will request that the firm confirm that the on-site report remains true and correct.

When an out-of-state firm applies for DBE certification with HDOT through the online Certification and Contract Compliance Management System, HDOT shall request a copy of the on-site report, any updates to the on-site review, and any evaluation of the firm based on the site visit within seven (7) days of receipt of the application. If another state UCP requests an on-site

report from HDOT for Hawaii-based firms seeking certification in another state, HDOT will provide the report within seven (7) days of the request.

HDOT shall review the application, on-site report and any supporting documents then make an eligibility determination no later than sixty (60) days following the receipt of all of the information from the firm necessary to make an eligibility determination. If eligible for certification, HDOT shall notify the firm that it is certified, and will be placed in HDOT's DBE Directory.

HDOT shall follow the DBE regulations in §26.88 when HDOT determines that there is good cause to believe that the firm is not eligible either due to an erroneous determination by the home state UCP, or for other reasons, such as state laws, rules or requirements. HDOT shall notify the firm of the particular reasons for this determination within sixty (60) days from receipt of all information from the firm necessary to make this determination.

If the DBE applicant firm does not agree with HDOT's determination of ineligibility, the firm may request a meeting with HDOT's decision maker. HDOT shall schedule the meeting within thirty (30) days of receiving the request.

The firm bears the burden of demonstrating, by a preponderance of evidence, that it meets the requirements with respect to the particularized issues raised by HDOT's denial notice. The firm is not otherwise responsible for further demonstrating its eligibility to HDOT.

HDOT shall issue a written decision within thirty (30) days of the receipt of the written response from the firm or the meeting with the decision maker, whichever is later. The firm's application for certification is stayed pending the outcome of this process. The firm may appeal the decision to the USDOT, Office of Civil Rights pursuant to §26.89.

If HDOT does not receive a copy of the site visit review report from a state UCP by a date fourteen (14) days after HDOT made a timely request for it, HDOT will not take action on the application and will hold the application in abeyance pending receipt of the site visit review report. HDOT shall notify the firm in writing of the delay in the process and the reason for it, no later than thirty (30) days from the date HDOT received from an applicant firm all the information required.

### **Denial of Initial Requests for Certification Section 26.86**

If a DBE applicant firm does not meet the eligibility requirements to be certified as a DBE, HDOT shall issue a denial letter, stating the reasons for the denial, applicable regulations, and information on appeal rights. Applicant firms may reapply after one (1) year from the date of the denial letter.

If an applicant firm decides to withdraw its application, it may do so at any time during the application process. The firm may reapply at any time.

## **Removal of a DBE's Eligibility Section 26.87**

The following procedures shall also apply to SBE certified firms.

In the event HDOT proposes to remove a DBE's certification, HDOT will follow procedures consistent with 49 CFR Section 26.87. Informal hearing procedures are outlined in Attachment F. To ensure separation of functions in a de-certification, HDOT has determined that the CRC or his/her designee will serve as the decision-maker in de-certification proceedings. HDOT has established an administrative "firewall" to ensure that the CRC will not have participated in any way in the de-certification proceeding against the firm (including in the decision to initiate such a proceeding). If it is determined that the CRC was involved in discussions regarding the firm's eligibility, a neutral third-party from another state UCP will oversee the de-certification proceedings.

Firms that have their eligibility removed in accordance with Section 26.87 proceedings, shall not be eligible to reapply for one (1) year following the de-certification notice.

## **Summary Suspension of DBE Certification Section 26.88**

Summary suspension procedures for DBE certification shall also apply to SBE firms.

HDOT must immediately suspend the DBE certification of the firm when the disadvantaged owner dies or is incarcerated.

HDOT may suspend a DBE immediately without adhering to Section 26.87 under the following conditions:

1. There is adequate evidence of material change;
2. DBE fails to notify HDOT of a material change; or
3. HDOT is directed by the operating administration to suspend the DBE.

When a firm is suspended, HDOT shall immediately notify the DBE of the suspension by certified mail, return receipt requested, to the last known address of the owner(s) of the DBE. The suspension takes effect when the DBE receives the Notice of Suspension.

While suspended, a prime contractor may not receive credit to meet a contract goal on a new contract, and any work the DBE does on a contract received during the suspension shall not be counted toward HDOT's overall goal. The DBE may continue to perform under an existing contract executed before the DBE received a Notice of Suspension and may be counted toward the contract goal during the period of suspension as long as the DBE is performing a CUF under the existing contract.

Following receipt of the Notice of Suspension, if the DBE believes it is no longer eligible, it may voluntarily withdraw from the program, in which case no further action is required. If the DBE believes that its eligibility should be reinstated, it must provide to HDOT information demonstrating that it is eligible notwithstanding its changed circumstances. Within thirty (30)

days of receiving this information, HDOT will either lift the suspension and reinstate the firm's certification or commence a decertification action under Section 26.87. If HDOT commences a decertification proceeding, the suspension remains in effect during the proceeding.

### **Certification Appeals Section 26.89**

Any DBE firm or DBE complainant may appeal HDOT's decision in a certification matter within 90 days of HDOT's final decision to USDOT. Such appeals may be sent to:

U.S. Department of Transportation  
Departmental Office of Civil Rights  
External Civil Rights Programs Division (S-33)  
1200 New Jersey Ave., S.E.  
Washington, DC 20590  
Phone: (202) 366-4754 TTY: (202) 366-9696  
Fax: (202) 366-5575

HDOT will promptly implement any USDOT certification appeal decision affecting the eligibility of DBEs for USDOT-assisted contracting (e.g., certify a firm if USDOT has determined that HDOT's denial of its application was erroneous).

Applicant firms that have filed an appeal with the USDOT may reapply for certification after the waiting period of one (1) year has elapsed, even if USDOT has not rendered an appeal decision.

### **Requests for Information**

Requests for information about the certification procedures contained in this Program Plan may be made to the DBE Program Certifier. Interested persons may contact the DBE Program Certifier at HDOT-DBE@hawaii.gov or at (808) 831-7914.

## **SUBPART F - MONITORING AND ENFORCEMENT**

### **Information, Confidentiality, Cooperation Section 26.109**

HDOT shall safeguard from disclosure to third parties, information that may reasonably be regarded as confidential business information, consistent with federal, state, and local law. This includes disclosure of confidential business or personal information prohibited by Section 92F-13 of the Hawaii Revised Statutes.

Notwithstanding any contrary provisions of state or local law, HDOT will not release personal financial information submitted in response to the personal net worth requirement to a third party (other than USDOT) without the written consent of the submitter.

## ATTACHMENTS

<b>Attachment A</b>	<b>Title 49 Code of Federal Regulations, Part 26</b>
<b>Attachment B</b>	<b>Hawaii Administrative Rules, title 19, Subtitle 1, Administration Chapter 1</b>
<b>Attachment C</b>	<b>Organizational Chart</b>
<b>Attachment D</b>	<b>Direct Access Memorandum</b>
<b>Attachment E</b>	<b>Small Business Utilization Plan</b>
<b>Attachment F</b>	<b>Informal Hearing Procedures</b>
<b>Attachment G</b>	<b>HDOT DBE Complaint Procedures and Form</b>

# ATTACHMENT A

Office of the Secretary of Transportation

Pt. 26

**§ 25.545 Pre-employment inquiries.**

(a) *Marital status.* A recipient shall not make pre-employment inquiry as to the marital status of an applicant for employment, including whether such applicant is "Miss" or "Mrs."

(b) *Sex.* A recipient may make pre-employment inquiry as to the sex of an applicant for employment, but only if such inquiry is made equally of such applicants of both sexes and if the results of such inquiry are not used in connection with discrimination prohibited by these Title IX regulations.

**§ 25.550 Sex as a bona fide occupational qualification.**

A recipient may take action otherwise prohibited by §§25.500 through 25.550 provided it is shown that sex is a bona fide occupational qualification for that action, such that consideration of sex with regard to such action is essential to successful operation of the employment function concerned. A recipient shall not take action pursuant to this section that is based upon alleged comparative employment characteristics or stereotyped characterizations of one or the other sex, or upon preference based on sex of the recipient, employees, students, or other persons, but nothing contained in this section shall prevent a recipient from considering an employee's sex in relation to employment in a locker room or toilet facility used only by members of one sex.

**Subpart F—Procedures**

**§ 25.600 Notice of covered programs.**

Within 60 days of September 29, 2000, each Federal agency that awards Federal financial assistance shall publish in the FEDERAL REGISTER a notice of the programs covered by these Title IX regulations. Each such Federal agency shall periodically republish the notice of covered programs to reflect changes in covered programs. Copies of this notice also shall be made available upon request to the Federal agency's office that enforces Title IX.

**§ 25.605 Enforcement procedures.**

The investigative, compliance, and enforcement procedural provisions of

Title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d) ("Title VI") are hereby adopted and applied to these Title IX regulations. These procedures may be found at 49 CFR part 21.

[65 FR 52895, Aug. 30, 2000]

**PART 26—PARTICIPATION BY DIS-ADVANTAGED BUSINESS ENTERPRISES IN DEPARTMENT OF TRANSPORTATION FINANCIAL ASSISTANCE PROGRAMS**

**Subpart A—General**

**Sec.**

- 26.1 What are the objectives of this part?
- 26.3 To whom does this part apply?
- 26.5 What do the terms used in this part mean?
- 26.7 What discriminatory actions are forbidden?
- 26.9 How does the Department issue guidance and interpretations under this part?
- 26.11 What records do recipients keep and report?
- 26.13 What assurances must recipients and contractors make?
- 26.15 How can recipients apply for exemptions or waivers?

**Subpart B—Administrative Requirements for DBE Programs for Federally-Assisted Contracting**

- 26.21 Who must have a DBE program?
- 26.23 What is the requirement for a policy statement?
- 26.25 What is the requirement for a liaison officer?
- 26.27 What efforts must recipients make concerning DBE financial institutions?
- 26.29 What prompt payment mechanisms must recipients have?
- 26.31 What requirements pertain to the DBE directory?
- 26.33 What steps must a recipient take to address overconcentration of DBEs in certain types of work?
- 26.35 What role do business development and mentor-protégé programs have in the DBE program?
- 26.37 What are a recipient's responsibilities for monitoring the performance of other program participants?

**Subpart C—Goals, Good Faith Efforts, and Counting**

- 26.41 What is the role of the statutory 10 percent goal in this program?
- 26.43 Can recipients use set-asides or quotas as part of this program?
- 26.45 How do recipients set overall goals?

## § 26.1

- 26.47 Can recipients be penalized for failing to meet overall goals?
- 26.49 How are overall goals established for transit vehicle manufacturers?
- 26.51 What means do recipients use to meet overall goals?
- 26.53 What are the good faith efforts procedures recipients follow in situations where there are contract goals?
- 26.55 How is DBE participation counted toward goals?

### Subpart D—Certification Standards

- 26.61 How are burdens of proof allocated in the certification process?
- 26.63 What rules govern group membership determinations?
- 26.65 What rules govern business size determinations?
- 26.67 What rules determine social and economic disadvantage?
- 26.69 What rules govern determinations of ownership?
- 26.71 What rules govern determinations concerning control?
- 26.73 What are other rules affecting certification?

### Subpart E—Certification Procedures

- 26.81 What are the requirements for Unified Certification Programs?
- 26.83 What procedures do recipients follow in making certification decisions?
- 26.84 How do recipients process applications submitted pursuant to the DOT/SBA MOU?
- 26.85 How do recipients respond to requests from DBE-certified firms or the SBA made pursuant to the DOT/SBA MOU?
- 26.86 What rules govern recipients' denials of initial requests for certification?
- 26.87 What procedures does a recipient use to remove a DBE's eligibility?
- 26.89 What is the process for certification appeals to the Department of Transportation?
- 26.91 What actions do recipients take following DOT certification appeal decisions?

### Subpart F—Compliance and Enforcement

- 26.101 What compliance procedures apply to recipients?
- 26.103 What enforcement actions apply in FHWA and FTA programs?
- 26.105 What enforcement actions apply in FAA programs?
- 26.107 What enforcement actions apply to firms participating in the DBE program?
- 26.109 What are the rules governing information, confidentiality, cooperation, and intimidation or retaliation?

APPENDIX A TO PART 26—GUIDANCE CONCERNING GOOD FAITH EFFORTS

## 49 CFR Subtitle A (10-1-10 Edition)

APPENDIX B TO PART 26—UNIFORM REPORT OF DBE AWARDS OR COMMITMENTS AND PAYMENTS FORM

APPENDIX C TO PART 26—DBE BUSINESS DEVELOPMENT PROGRAM GUIDELINES

APPENDIX D TO PART 26—MENTOR-PROTÉGÉ PROGRAM GUIDELINES

APPENDIX E TO PART 26—INDIVIDUAL DETERMINATIONS OF SOCIAL AND ECONOMIC DISADVANTAGE

APPENDIX F TO PART 26—UNIFORM CERTIFICATION APPLICATION FORM

AUTHORITY: 23 U.S.C. 324; 42 U.S.C. 2000d, *et seq.*; 49 U.S.C. 1615, 47107, 47113, 47123; Sec. 1101(b), Pub. L. 105-178, 112 Stat. 107, 113.

SOURCE: 64 FR 5126, Feb. 2, 1999, unless otherwise noted.

### Subpart A—General

#### § 26.1 What are the objectives of this part?

This part seeks to achieve several objectives:

- (a) To ensure nondiscrimination in the award and administration of DOT-assisted contracts in the Department's highway, transit, and airport financial assistance programs;
- (b) To create a level playing field on which DBEs can compete fairly for DOT-assisted contracts;
- (c) To ensure that the Department's DBE program is narrowly tailored in accordance with applicable law;
- (d) To ensure that only firms that fully meet this part's eligibility standards are permitted to participate as DBEs;
- (e) To help remove barriers to the participation of DBEs in DOT-assisted contracts;
- (f) To assist the development of firms that can compete successfully in the marketplace outside the DBE program; and
- (g) To provide appropriate flexibility to recipients of Federal financial assistance in establishing and providing opportunities for DBEs.

#### § 26.3 To whom does this part apply?

(a) If you are a recipient of any of the following types of funds, this part applies to you:

- (1) Federal-aid highway funds authorized under Titles I (other than Part B) and V of the Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA), Pub. L. 102-240, 105 Stat. 1914,

or Titles I, III, and V of the Transportation Equity Act for the 21st Century (TEA-21), Pub. L. 105-178, 112 Stat. 107.

(2) Federal transit funds authorized by Titles I, III, V and VI of ISTEA, Pub. L. 102-240 or by Federal transit laws in Title 49, U.S. Code, or Titles I, III, and V of the TEA-21, Pub. L. 105-178.

(3) Airport funds authorized by 49 U.S.C. 47101, *et seq.*

(b) [Reserved]

(c) If you are letting a contract, and that contract is to be performed entirely outside the United States, its territories and possessions, Puerto Rico, Guam, or the Northern Marianas Islands, this part does not apply to the contract.

(d) If you are letting a contract in which DOT financial assistance does not participate, this part does not apply to the contract.

#### § 26.5 What do the terms used in this part mean?

*Affiliation* has the same meaning the term has in the Small Business Administration (SBA) regulations, 13 CFR part 121.

(1) Except as otherwise provided in 13 CFR part 121, concerns are affiliates of each other when, either directly or indirectly:

(i) One concern controls or has the power to control the other; or

(ii) A third party or parties controls or has the power to control both; or

(iii) An identity of interest between or among parties exists such that affiliation may be found.

(2) In determining whether affiliation exists, it is necessary to consider all appropriate factors, including common ownership, common management, and contractual relationships. Affiliates must be considered together in determining whether a concern meets small business size criteria and the statutory cap on the participation of firms in the DBE program.

*Alaska Native* means a citizen of the United States who is a person of one-fourth degree or more Alaskan Indian (including Tsimshian Indians not enrolled in the Metlaktila Indian Community), Eskimo, or Aleut blood, or a combination of those bloodlines. The term includes, in the absence of proof

of a minimum blood quantum, any citizen whom a Native village or Native group regards as an Alaska Native if their father or mother is regarded as an Alaska Native.

*Alaska Native Corporation* (ANC) means any Regional Corporation, Village Corporation, Urban Corporation, or Group Corporation organized under the laws of the State of Alaska in accordance with the Alaska Native Claims Settlement Act, as amended (43 U.S.C. 1601, *et seq.*).

*Compliance* means that a recipient has correctly implemented the requirements of this part.

*Contract* means a legally binding relationship obligating a seller to furnish supplies or services (including, but not limited to, construction and professional services) and the buyer to pay for them. For purposes of this part, a lease is considered to be a contract.

*Contractor* means one who participates, through a contract or subcontract (at any tier), in a DOT-assisted highway, transit, or airport program.

*Department* or *DOT* means the U.S. Department of Transportation, including the Office of the Secretary, the Federal Highway Administration (FHWA), the Federal Transit Administration (FTA), and the Federal Aviation Administration (FAA).

*Disadvantaged business enterprise* or *DBE* means a for-profit small business concern—

(1) That is at least 51 percent owned by one or more individuals who are both socially and economically disadvantaged or, in the case of a corporation, in which 51 percent of the stock is owned by one or more such individuals; and

(2) Whose management and daily business operations are controlled by one or more of the socially and economically disadvantaged individuals who own it.

*DOT-assisted contract* means any contract between a recipient and a contractor (at any tier) funded in whole or in part with DOT financial assistance, including letters of credit or loan guarantees, except a contract solely for the purchase of land.

*DOT/SBA Memorandum of Understanding or MOU*, refers to the agreement signed on November 23, 1999, between the Department of Transportation (DOT) and the Small Business Administration (SBA) streamlining certification procedures for participation in SBA's 8(a) Business Development (8(a) BD) and Small Disadvantaged Business (SDB) programs, and DOT's Disadvantaged Business Enterprise (DBE) program for small and disadvantaged businesses.

*Good faith efforts* means efforts to achieve a DBE goal or other requirement of this part which, by their scope, intensity, and appropriateness to the objective, can reasonably be expected to fulfill the program requirement.

*Immediate family member* means father, mother, husband, wife, son, daughter, brother, sister, grandmother, grandfather, grandson, granddaughter, mother-in-law, or father-in-law.

*Indian tribe* means any Indian tribe, band, nation, or other organized group or community of Indians, including any ANC, which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians, or is recognized as such by the State in which the tribe, band, nation, group, or community resides. See definition of "tribally-owned concern" in this section.

*Joint venture* means an association of a DBE firm and one or more other firms to carry out a single, for-profit business enterprise, for which the parties combine their property, capital, efforts, skills and knowledge, and in which the DBE is responsible for a distinct, clearly defined portion of the work of the contract and whose share in the capital contribution, control, management, risks, and profits of the joint venture are commensurate with its ownership interest.

*Native Hawaiian* means any individual whose ancestors were natives, prior to 1778, of the area which now comprises the State of Hawaii.

*Native Hawaiian Organization* means any community service organization serving Native Hawaiians in the State of Hawaii which is a not-for-profit organization chartered by the State of Hawaii, is controlled by Native Hawai-

ians, and whose business activities will principally benefit such Native Hawaiians.

*Noncompliance* means that a recipient has not correctly implemented the requirements of this part.

*Operating Administration or OA* means any of the following parts of DOT: the Federal Aviation Administration (FAA), Federal Highway Administration (FHWA), and Federal Transit Administration (FTA). The "Administrator" of an operating administration includes his or her designees.

*Personal net worth* means the net value of the assets of an individual remaining after total liabilities are deducted. An individual's personal net worth does not include: The individual's ownership interest in an applicant or participating DBE firm; or the individual's equity in his or her primary place of residence. An individual's personal net worth includes only his or her own share of assets held jointly or as community property with the individual's spouse.

*Primary industry classification* means the North American Industrial Classification System (NAICS) designation which best describes the primary business of a firm. The NAICS is described in the *North American Industry Classification Manual—United States, 1997* which is available from the National Technical Information Service, 5285 Port Royal Road, Springfield, VA, 22161; by calling 1 (800) 553-6847; or via the Internet at: <http://www.ntis.gov/product/naics.htm>.

*Primary recipient* means a recipient which receives DOT financial assistance and passes some or all of it on to another recipient.

*Principal place of business* means the business location where the individuals who manage the firm's day-to-day operations spend most working hours and where top management's business records are kept. If the offices from which management is directed and where business records are kept are in different locations, the recipient will determine the principal place of business for DBE program purposes.

*Program* means any undertaking on a recipient's part to use DOT financial assistance, authorized by the laws to which this part applies.

*Race-conscious* measure or program is one that is focused specifically on assisting only DBEs, including women-owned DBEs.

*Race-neutral* measure or program is one that is, or can be, used to assist all small businesses. For the purposes of this part, *race-neutral* includes gender-neutrality.

*Recipient* is any entity, public or private, to which DOT financial assistance is extended, whether directly or through another recipient, through the programs of the FAA, FHWA, or FTA, or who has applied for such assistance.

*Secretary* means the Secretary of Transportation or his/her designee.

*Set-aside* means a contracting practice restricting eligibility for the competitive award of a contract solely to DBE firms.

*Small Business Administration* or *SBA* means the United States Small Business Administration.

*SBA certified firm* refers to firms that have a current, valid certification from or recognized by the SBA under the 8(a) BD or SDB programs.

*Small business concern* means, with respect to firms seeking to participate as DBEs in DOT-assisted contracts, a small business concern as defined pursuant to section 3 of the Small Business Act and Small Business Administration regulations implementing it (13 CFR part 121) that also does not exceed the cap on average annual gross receipts specified in § 26.65(b).

*Socially and economically disadvantaged individual* means any individual who is a citizen (or lawfully admitted permanent resident) of the United States and who is—

(1) Any individual who a recipient finds to be a socially and economically disadvantaged individual on a case-by-case basis.

(2) Any individual in the following groups, members of which are rebuttably presumed to be socially and economically disadvantaged:

(i) "Black Americans," which includes persons having origins in any of the Black racial groups of Africa;

(ii) "Hispanic Americans," which includes persons of Mexican, Puerto Rican, Cuban, Dominican, Central or South American, or other Spanish or

Portuguese culture or origin, regardless of race;

(iii) "Native Americans," which includes persons who are American Indians, Eskimos, Aleuts, or Native Hawaiians;

(iv) "Asian-Pacific Americans," which includes persons whose origins are from Japan, China, Taiwan, Korea, Burma (Myanmar), Vietnam, Laos, Cambodia (Kampuchea), Thailand, Malaysia, Indonesia, the Philippines, Brunei, Samoa, Guam, the U.S. Trust Territories of the Pacific Islands (Republic of Palau), the Commonwealth of the Northern Marianas Islands, Macao, Fiji, Tonga, Kiribati, Juvalu, Nauru, Federated States of Micronesia, or Hong Kong;

(v) "Subcontinent Asian Americans," which includes persons whose origins are from India, Pakistan, Bangladesh, Bhutan, the Maldives Islands, Nepal or Sri Lanka;

(vi) Women;

(vii) Any additional groups whose members are designated as socially and economically disadvantaged by the SBA, at such time as the SBA designation becomes effective.

*Tribally-owned concern* means any concern at least 51 percent owned by an Indian tribe as defined in this section.

*You* refers to a recipient, unless a statement in the text of this part or the context requires otherwise (i.e., 'You must do XYZ' means that recipients must do XYZ).

[64 FR 5126, Feb. 2, 1999, as amended at 64 FR 34570, June 28, 1999; 68 FR 35553, June 16, 2003]

#### § 26.7 What discriminatory actions are forbidden?

(a) You must never exclude any person from participation in, deny any person the benefits of, or otherwise discriminate against anyone in connection with the award and performance of any contract covered by this part on the basis of race, color, sex, or national origin.

(b) In administering your DBE program, you must not, directly or through contractual or other arrangements, use criteria or methods of administration that have the effect of defeating or substantially impairing accomplishment of the objectives of the program with respect to individuals of

## § 26.9

a particular race, color, sex, or national origin.

### § 26.9 How does the Department issue guidance and interpretations under this part?

(a) Only guidance and interpretations (including interpretations set forth in certification appeal decisions) consistent with this part 26 and issued after March 4, 1999 express the official positions and views of the Department of Transportation or any of its operating administrations.

(b) The Secretary of Transportation, Office of the Secretary of Transportation, FHWA, FTA, and FAA may issue written interpretations of or written guidance concerning this part. Written interpretations and guidance are valid, and express the official positions and views of the Department of Transportation or any of its operating administrations, only if they are issued over the signature of the Secretary of Transportation or if they contain the following statement:

The General Counsel of the Department of Transportation has reviewed this document and approved it as consistent with the language and intent of 49 CFR part 26.

[72 FR 15617, Apr. 2, 2007]

### § 26.11 What records do recipients keep and report?

(a) [Reserved]

(b) You must continue to provide data about your DBE program to the Department as directed by DOT operating administrations.

(c) You must create and maintain a bidders list.

(1) The purpose of this list is to provide you as accurate data as possible about the universe of DBE and non-DBE contractors and subcontractors who seek to work on your Federally-assisted contracts for use in helping you set your overall goals.

(2) You must obtain the following information about DBE and non-DBE contractors and subcontractors who seek to work on your Federally-assisted contracts:

- (i) Firm name;
- (ii) Firm address;
- (iii) Firm's status as a DBE or non-DBE;
- (iv) Age of the firm; and

## 49 CFR Subtitle A (10-1-10 Edition)

(v) The annual gross receipts of the firm. You may obtain this information by asking each firm to indicate into what gross receipts bracket they fit (*e.g.*, less than \$500,000; \$500,000-\$1 million; \$1-2 million; \$2-5 million; etc.) rather than requesting an exact figure from the firm.

(3) You may acquire the information for your bidders list in a variety of ways. For example, you can collect the data from all bidders, before or after the bid due date. You can conduct a survey that will result in statistically sound estimate of the universe of DBE and non-DBE contractors and subcontractors who seek to work on your Federally-assisted contracts. You may combine different data collection approaches (*e.g.*, collect name and address information from all bidders, while conducting a survey with respect to age and gross receipts information).

[64 FR 5126, Feb. 2, 1999, as amended at 65 FR 68951, Nov. 15, 2000]

### § 26.13 What assurances must recipients and contractors make?

(a) Each financial assistance agreement you sign with a DOT operating administration (or a primary recipient) must include the following assurance:

The recipient shall not discriminate on the basis of race, color, national origin, or sex in the award and performance of any DOT-assisted contract or in the administration of its DBE program or the requirements of 49 CFR part 26. The recipient shall take all necessary and reasonable steps under 49 CFR part 26 to ensure nondiscrimination in the award and administration of DOT-assisted contracts. The recipient's DBE program, as required by 49 CFR part 26 and as approved by DOT, is incorporated by reference in this agreement. Implementation of this program is a legal obligation and failure to carry out its terms shall be treated as a violation of this agreement. Upon notification to the recipient of its failure to carry out its approved program, the Department may impose sanctions as provided for under part 26 and may, in appropriate cases, refer the matter for enforcement under 18 U.S.C. 1001 and/or the Program Fraud Civil Remedies Act of 1986 (31 U.S.C. 3801 *et seq.*).

(b) Each contract you sign with a contractor (and each subcontract the prime contractor signs with a subcontractor) must include the following assurance:

The contractor, sub recipient or subcontractor shall not discriminate on the basis of race, color, national origin, or sex in the performance of this contract. The contractor shall carry out applicable requirements of 49 CFR part 26 in the award and administration of DOT-assisted contracts. Failure by the contractor to carry out these requirements is a material breach of this contract, which may result in the termination of this contract or such other remedy as the recipient deems appropriate.

**§ 26.15 How can recipients apply for exemptions or waivers?**

(a) You can apply for an exemption from any provision of this part. To apply, you must request the exemption in writing from the Office of the Secretary of Transportation, FHWA, FTA, or FAA. The Secretary will grant the request only if it documents special or exceptional circumstances, not likely to be generally applicable, and not contemplated in connection with the rule-making that established this part, that make your compliance with a specific provision of this part impractical. You must agree to take any steps that the Department specifies to comply with the intent of the provision from which an exemption is granted. The Secretary will issue a written response to all exemption requests.

(b) You can apply for a waiver of any provision of Subpart B or C of this part including, but not limited to, any provisions regarding administrative requirements, overall goals, contract goals or good faith efforts. Program waivers are for the purpose of authorizing you to operate a DBE program that achieves the objectives of this part by means that may differ from one or more of the requirements of Subpart B or C of this part. To receive a program waiver, you must follow these procedures:

(1) You must apply through the concerned operating administration. The application must include a specific program proposal and address how you will meet the criteria of paragraph (b)(2) of this section. Before submitting your application, you must have had public participation in developing your proposal, including consultation with the DBE community and at least one public hearing. Your application must include a summary of the public par-

ticipation process and the information gathered through it.

(2) Your application must show that—

(i) There is a reasonable basis to conclude that you could achieve a level of DBE participation consistent with the objectives of this part using different or innovative means other than those that are provided in subpart B or C of this part;

(ii) Conditions in your jurisdiction are appropriate for implementing the proposal;

(iii) Your proposal would prevent discrimination against any individual or group in access to contracting opportunities or other benefits of the program; and

(iv) Your proposal is consistent with applicable law and program requirements of the concerned operating administration's financial assistance program.

(3) The Secretary has the authority to approve your application. If the Secretary grants your application, you may administer your DBE program as provided in your proposal, subject to the following conditions:

(i) DBE eligibility is determined as provided in subparts D and E of this part, and DBE participation is counted as provided in § 26.49;

(ii) Your level of DBE participation continues to be consistent with the objectives of this part;

(iii) There is a reasonable limitation on the duration of your modified program; and

(iv) Any other conditions the Secretary makes on the grant of the waiver.

(4) The Secretary may end a program waiver at any time and require you to comply with this part's provisions. The Secretary may also extend the waiver, if he or she determines that all requirements of paragraphs (b)(2) and (3) of this section continue to be met. Any such extension shall be for no longer than period originally set for the duration of the program.

**§ 26.21**

**Subpart B—Administrative Requirements for DBE Programs for Federally-Assisted Contracting**

**§ 26.21 Who must have a DBE program?**

(a) If you are in one of these categories and let DOT-assisted contracts, you must have a DBE program meeting the requirements of this part:

(1) All FHWA recipients receiving funds authorized by a statute to which this part applies;

(2) FTA recipients receiving planning, capital and/or operating assistance who will award prime contracts (excluding transit vehicle purchases) exceeding \$250,000 in FTA funds in a Federal fiscal year;

(3) FAA recipients receiving grants for airport planning or development who will award prime contracts exceeding \$250,000 in FAA funds in a Federal fiscal year.

(b)(1) You must submit a DBE program conforming to this part by August 31, 1999 to the concerned operating administration (OA). Once the OA has approved your program, the approval counts for all of your DOT-assisted programs (except that goals are reviewed by the particular operating administration that provides funding for your DOT-assisted contracts).

(2) You do not have to submit regular updates of your DBE programs, as long as you remain in compliance. However, you must submit significant changes in the program for approval.

(c) You are not eligible to receive DOT financial assistance unless DOT has approved your DBE program and you are in compliance with it and this part. You must continue to carry out your program until all funds from DOT financial assistance have been expended.

[64 FR 5126, Feb. 2, 1999, as amended at 64 FR 34570, June 28, 1999; 65 FR 68951, Nov. 15, 2000]

**§ 26.23 What is the requirement for a policy statement?**

You must issue a signed and dated policy statement that expresses your commitment to your DBE program, states its objectives, and outlines responsibilities for its implementation.

**49 CFR Subtitle A (10-1-10 Edition)**

You must circulate the statement throughout your organization and to the DBE and non-DBE business communities that perform work on your DOT-assisted contracts.

**§ 26.25 What is the requirement for a liaison officer?**

You must have a DBE liaison officer, who shall have direct, independent access to your Chief Executive Officer concerning DBE program matters. The liaison officer shall be responsible for implementing all aspects of your DBE program. You must also have adequate staff to administer the program in compliance with this part.

**§ 26.27 What efforts must recipients make concerning DBE financial institutions?**

You must thoroughly investigate the full extent of services offered by financial institutions owned and controlled by socially and economically disadvantaged individuals in your community and make reasonable efforts to use these institutions. You must also encourage prime contractors to use such institutions.

**§ 26.29 What prompt payment mechanisms must recipients have?**

(a) You must establish, as part of your DBE program, a contract clause to require prime contractors to pay subcontractors for satisfactory performance of their contracts no later than 30 days from receipt of each payment you make to the prime contractor.

(b) You must ensure prompt and full payment of retainage from the prime contractor to the subcontractor within 30 days after the subcontractor's work is satisfactorily completed. You must use one of the following methods to comply with this requirement:

(1) You may decline to hold retainage from prime contractors and prohibit prime contractors from holding retainage from subcontractors.

(2) You may decline to hold retainage from prime contractors and require a contract clause obligating prime contractors to make prompt and full payment of any retainage kept by prime contractor to the subcontractor within

30 days after the subcontractor's work is satisfactorily completed.

(3) You may hold retainage from prime contractors and provide for prompt and regular incremental acceptances of portions of the prime contract, pay retainage to prime contractors based on these acceptances, and require a contract clause obligating the prime contractor to pay all retainage owed to the subcontractor for satisfactory completion of the accepted work within 30 days after your payment to the prime contractor.

(c) For purposes of this section, a subcontractor's work is satisfactorily completed when all the tasks called for in the subcontract have been accomplished and documented as required by the recipient. When a recipient has made an incremental acceptance of a portion of a prime contract, the work of a subcontractor covered by that acceptance is deemed to be satisfactorily completed.

(d) Your DBE program must provide appropriate means to enforce the requirements of this section. These means may include appropriate penalties for failure to comply, the terms and conditions of which you set. Your program may also provide that any delay or postponement of payment among the parties may take place only for good cause, with your prior written approval.

(e) You may also establish, as part of your DBE program, any of the following additional mechanisms to ensure prompt payment:

(1) A contract clause that requires prime contractors to include in their subcontracts language providing that prime contractors and subcontractors will use appropriate alternative dispute resolution mechanisms to resolve payment disputes. You may specify the nature of such mechanisms.

(2) A contract clause providing that the prime contractor will not be reimbursed for work performed by subcontractors unless and until the prime contractor ensures that the subcontractors are promptly paid for the work they have performed.

(3) Other mechanisms, consistent with this part and applicable state and local law, to ensure that DBEs and

other contractors are fully and promptly paid.

[68 FR 35553, June 16, 2003]

**§ 26.31 What requirements pertain to the DBE directory?**

You must maintain and make available to interested persons a directory identifying all firms eligible to participate as DBEs in your program. In the listing for each firm, you must include its address, phone number, and the types of work the firm has been certified to perform as a DBE. You must revise your directory at least annually and make updated information available to contractors and the public on request.

**§ 26.33 What steps must a recipient take to address overconcentration of DBEs in certain types of work?**

(a) If you determine that DBE firms are so overconcentrated in a certain type of work as to unduly burden the opportunity of non-DBE firms to participate in this type of work, you must devise appropriate measures to address this overconcentration.

(b) These measures may include the use of incentives, technical assistance, business development programs, mentor-protégé programs, and other appropriate measures designed to assist DBEs in performing work outside of the specific field in which you have determined that non-DBEs are unduly burdened. You may also consider varying your use of contract goals, to the extent consistent with § 26.51, to ensure that non-DBEs are not unfairly prevented from competing for subcontracts.

(c) You must obtain the approval of the concerned DOT operating administration for your determination of overconcentration and the measures you devise to address it. Once approved, the measures become part of your DBE program.

**§ 26.35 What role do business development and mentor-protégé programs have in the DBE program?**

(a) You may or, if an operating administration directs you to, you must establish a DBE business development program (BDP) to assist firms in gaining the ability to compete successfully

## **§ 26.37**

in the marketplace outside the DBE program. You may require a DBE firm, as a condition of receiving assistance through the BDP, to agree to terminate its participation in the DBE program after a certain time has passed or certain objectives have been reached. See Appendix C of this part for guidance on administering BDP programs.

(b) As part of a BDP or separately, you may establish a "mentor-protégé" program, in which another DBE or non-DBE firm is the principal source of business development assistance to a DBE firm.

(1) Only firms you have certified as DBEs before they are proposed for participation in a mentor-protégé program are eligible to participate in the mentor-protégé program.

(2) During the course of the mentor-protégé relationship, you must:

(i) Not award DBE credit to a non-DBE mentor firm for using its own protégé firm for more than one half of its goal on any contract let by the recipient; and

(ii) Not award DBE credit to a non-DBE mentor firm for using its own protégé firm for more than every other contract performed by the protégé firm.

(3) For purposes of making determinations of business size under this part, you must not treat protégé firms as affiliates of mentor firms, when both firms are participating under an approved mentor-protégé program. See Appendix D of this part for guidance concerning the operation of mentor-protégé programs.

(c) Your BDPs and mentor-protégé programs must be approved by the concerned operating administration before you implement them. Once approved, they become part of your DBE program.

### **§ 26.37 What are a recipient's responsibilities for monitoring the performance of other program participants?**

(a) You must implement appropriate mechanisms to ensure compliance with the part's requirements by all program participants (e.g., applying legal and contract remedies available under Federal, state and local law). You must set

## **49 CFR Subtitle A (10-1-10 Edition)**

forth these mechanisms in your DBE program.

(b) Your DBE program must also include a monitoring and enforcement mechanism to ensure that work committed to DBEs at contract award is actually performed by DBEs.

(c) This mechanism must provide for a running tally of actual DBE attainments (e.g., payments actually made to DBE firms), including a means of comparing these attainments to commitments. In your reports of DBE participation to the Department, you must display both commitments and attainments.

[64 FR 5126, Feb. 2, 1999, as amended at 65 FR 68951, Nov. 15, 2000; 68 FR 35554, June 16, 2003]

## **Subpart C—Goals, Good Faith Efforts, and Counting**

### **§ 26.41 What is the role of the statutory 10 percent goal in this program?**

(a) The statutes authorizing this program provide that, except to the extent the Secretary determines otherwise, not less than 10 percent of the authorized funds are to be expended with DBEs.

(b) This 10 percent goal is an aspirational goal at the national level, which the Department uses as a tool in evaluating and monitoring DBEs' opportunities to participate in DOT-assisted contracts.

(c) The national 10 percent goal does not authorize or require recipients to set overall or contract goals at the 10 percent level, or any other particular level, or to take any special administrative steps if their goals are above or below 10 percent.

### **§ 26.43 Can recipients use set-asides or quotas as part of this program?**

(a) You are not permitted to use quotas for DBEs on DOT-assisted contracts subject to this part.

(b) You may not set-aside contracts for DBEs on DOT-assisted contracts subject to this part, except that, in limited and extreme circumstances, you may use set-asides when no other method could be reasonably expected to redress egregious instances of discrimination.

**§ 26.45 How do recipients set overall goals?**

(a)(1) Except as provided in paragraph (a)(2) of this section, you must set an overall goal for DBE participation in your DOT-assisted contracts.

(2) If you are a FTA or FAA recipient who reasonably anticipates awarding (excluding transit vehicle purchases) \$250,000 or less in FTA or FAA funds in prime contracts in a Federal fiscal year, you are not required to develop overall goals for FTA or FAA respectively for that fiscal year. However, if you have an existing DBE program, it must remain in effect and you must seek to fulfill the objectives outlined in § 26.1.

(b) Your overall goal must be based on demonstrable evidence of the availability of ready, willing and able DBEs relative to all businesses ready, willing and able to participate on your DOT-assisted contracts (hereafter, the "relative availability of DBEs"). The goal must reflect your determination of the level of DBE participation you would expect absent the effects of discrimination. You cannot simply rely on either the 10 percent national goal, your previous overall goal or past DBE participation rates in your program without reference to the relative availability of DBEs in your market.

(c) *Step 1.* You must begin your goal setting process by determining a base figure for the relative availability of DBEs. The following are examples of approaches that you may take toward determining a base figure. These examples are provided as a starting point for your goal setting process. Any percentage figure derived from one of these examples should be considered a basis from which you begin when examining all evidence available in your jurisdiction. These examples are not intended as an exhaustive list. Other methods or combinations of methods to determine a base figure may be used, subject to approval by the concerned operating administration.

(1) *Use DBE Directories and Census Bureau Data.* Determine the number of ready, willing and able DBEs in your market from your DBE directory. Using the Census Bureau's County Business Pattern (CBP) data base, determine the number of all ready, will-

ing and able businesses available in your market that perform work in the same NAICS codes. (Information about the CBP data base may be obtained from the Census Bureau at their web site, [www.census.gov/epcd/cbp/view/cbpview.html](http://www.census.gov/epcd/cbp/view/cbpview.html).) Divide the number of DBEs by the number of all businesses to derive a base figure for the relative availability of DBEs in your market.

(2) *Use a bidders list.* Determine the number of DBEs that have bid or quoted on your DOT-assisted prime contracts or subcontracts in the previous year. Determine the number of all businesses that have bid or quoted on prime or subcontracts in the same time period. Divide the number of DBE bidders and quoters by the number for all businesses to derive a base figure for the relative availability of DBEs in your market.

(3) *Use data from a disparity study.* Use a percentage figure derived from data in a valid, applicable disparity study.

(4) *Use the goal of another DOT recipient.* If another DOT recipient in the same, or substantially similar, market has set an overall goal in compliance with this rule, you may use that goal as a base figure for your goal.

(5) *Alternative methods.* You may use other methods to determine a base figure for your overall goal. Any methodology you choose must be based on demonstrable evidence of local market conditions and be designed to ultimately attain a goal that is rationally related to the relative availability of DBEs in your market.

(d) *Step 2.* Once you have calculated a base figure, you must examine all of the evidence available in your jurisdiction to determine what adjustment, if any, is needed to the base figure in order to arrive at your overall goal.

(1) There are many types of evidence that must be considered when adjusting the base figure. These include:

(i) The current capacity of DBEs to perform work in your DOT-assisted contracting program, as measured by the volume of work DBEs have performed in recent years;

(ii) Evidence from disparity studies conducted anywhere within your jurisdiction, to the extent it is not already accounted for in your base figure; and

## § 26.45

(iii) If your base figure is the goal of another recipient, you must adjust it for differences in your local market and your contracting program.

(2) If available, you must consider evidence from related fields that affect the opportunities for DBEs to form, grow and compete. These include, but are not limited to:

(i) Statistical disparities in the ability of DBEs to get the financing, bonding and insurance required to participate in your program;

(ii) Data on employment, self-employment, education, training and union apprenticeship programs, to the extent you can relate it to the opportunities for DBEs to perform in your program.

(3) If you attempt to make an adjustment to your base figure to account for the continuing effects of past discrimination (often called the "but for" factor) or the effects of an ongoing DBE program, the adjustment must be based on demonstrable evidence that is logically and directly related to the effect for which the adjustment is sought.

(e) Once you have determined a percentage figure in accordance with paragraphs (c) and (d) of this section, you should express your overall goal as follows:

(1) If you are an FHWA recipient, as a percentage of all Federal-aid highway funds you will expend in FHWA-assisted contracts in the forthcoming three fiscal years.

(2) If you are an FTA or FAA recipient, as a percentage of all FTA or FAA funds (exclusive of FTA funds to be used for the purchase of transit vehicles) that you will expend in FTA- or FAA-assisted contracts in the three forthcoming fiscal years.

(3) In appropriate cases, the FHWA, FTA or FAA Administrator may permit you to express your overall goal as a percentage of funds for a particular grant or project or group of grants and/or projects.

(f)(1) If you set overall goals on a fiscal year basis, you must submit them to the applicable DOT operating administration by August 1 at three-year intervals, based on a schedule established by the FHWA, FTA, or FAA, as applicable, and posted on that agency's Web site. You must submit to the oper-

## 49 CFR Subtitle A (10-1-10 Edition)

ating administration for approval any significant adjustment you make to your goal during the three-year period based on changed circumstances. The operating administration may direct you to undertake a review of your goal if necessary to ensure that the goal continues to fit your circumstances appropriately.

(2) If you are an FHWA, FTA, or FAA recipient and set your overall goal on a project or grant basis, you must submit the goal for review at a time determined by the FHWA, FTA, or FAA Administrator.

(3) Timely submission and operating administration approval of your overall goal is a condition of eligibility for DOT financial assistance.

(4) If you fail to establish and implement goals as provided in this section, you are not in compliance with this part. If you establish and implement goals in a way different from that provided in this part, you are not in compliance with this part. If you fail to comply with this requirement, you are not eligible to receive DOT financial assistance.

(g) In establishing an overall goal, you must provide for public participation. This public participation must include:

(1) Consultation with minority, women's and general contractor groups, community organizations, and other officials or organizations which could be expected to have information concerning the availability of disadvantaged and non-disadvantaged businesses, the effects of discrimination on opportunities for DBEs, and your efforts to establish a level playing field for the participation of DBEs.

(2) A published notice announcing your proposed overall goal, informing the public that the proposed goal and its rationale are available for inspection during normal business hours at your principal office for 30 days following the date of the notice, and informing the public that you and the Department will accept comments on the goals for 45 days from the date of the notice. The notice must include addresses to which comments may be sent, and you must publish it in general circulation media and available

minority-focused media and trade association publications.

(h) Your overall goals must provide for participation by all certified DBEs and must not be subdivided into group-specific goals.

[64 FR 5126, Feb. 2, 1999, as amended at 64 FR 34570, June 28, 1999; 65 FR 68951, Nov. 15, 2000; 68 FR 35553, June 16, 2003; 75 FR 5536, Feb. 3, 2010]

**§26.47 Can recipients be penalized for failing to meet overall goals?**

(a) You cannot be penalized, or treated by the Department as being in non-compliance with this rule, because your DBE participation falls short of your overall goal, unless you have failed to administer your program in good faith.

(b) If you do not have an approved DBE program or overall goal, or if you fail to implement your program in good faith, you are in noncompliance with this part.

**§26.49 How are overall goals established for transit vehicle manufacturers?**

(a) If you are an FTA recipient, you must require in your DBE program that each transit vehicle manufacturer, as a condition of being authorized to bid or propose on FTA-assisted transit vehicle procurements, certify that it has complied with the requirements of this section. You do not include FTA assistance used in transit vehicle procurements in the base amount from which your overall goal is calculated.

(b) If you are a transit vehicle manufacturer, you must establish and submit for FTA's approval an annual overall percentage goal. In setting your overall goal, you should be guided, to the extent applicable, by the principles underlying §26.45. The base from which you calculate this goal is the amount of FTA financial assistance included in transit vehicle contracts you will perform during the fiscal year in question. You must exclude from this base funds attributable to work performed outside the United States and its territories, possessions, and commonwealths. The requirements and procedures of this part with respect to submission and ap-

proval of overall goals apply to you as they do to recipients.

(c) As a transit vehicle manufacturer, you may make the certification required by this section if you have submitted the goal this section requires and FTA has approved it or not disapproved it.

(d) As a recipient, you may, with FTA approval, establish project-specific goals for DBE participation in the procurement of transit vehicles in lieu of complying through the procedures of this section.

(e) If you are an FHWA or FAA recipient, you may, with FHWA or FAA approval, use the procedures of this section with respect to procurements of vehicles or specialized equipment. If you choose to do so, then the manufacturers of this equipment must meet the same requirements (including goal approval by FHWA or FAA) as transit vehicle manufacturers must meet in FTA-assisted procurements.

**§26.51 What means do recipients use to meet overall goals?**

(a) You must meet the maximum feasible portion of your overall goal by using race-neutral means of facilitating DBE participation. Race-neutral DBE participation includes any time a DBE wins a prime contract through customary competitive procurement procedures, is awarded a subcontract on a prime contract that does not carry a DBE goal, or even if there is a DBE goal, wins a subcontract from a prime contractor that did not consider its DBE status in making the award (e.g., a prime contractor that uses a strict low bid system to award subcontracts).

(b) Race-neutral means include, but are not limited to, the following:

(1) Arranging solicitations, times for the presentation of bids, quantities, specifications, and delivery schedules in ways that facilitate DBE, and other small businesses, participation (e.g., unbundling large contracts to make them more accessible to small businesses, requiring or encouraging prime contractors to subcontract portions of work that they might otherwise perform with their own forces);

(2) Providing assistance in overcoming limitations such as inability to

## § 26.51

obtain bonding or financing (e.g., by such means as simplifying the bonding process, reducing bonding requirements, eliminating the impact of surety costs from bids, and providing services to help DBEs, and other small businesses, obtain bonding and financing);

(3) Providing technical assistance and other services;

(4) Carrying out information and communications programs on contracting procedures and specific contract opportunities (e.g., ensuring the inclusion of DBEs, and other small businesses, on recipient mailing lists for bidders; ensuring the dissemination to bidders on prime contracts of lists of potential subcontractors; provision of information in languages other than English, where appropriate);

(5) Implementing a supportive services program to develop and improve immediate and long-term business management, record keeping, and financial and accounting capability for DBEs and other small businesses;

(6) Providing services to help DBEs, and other small businesses, improve long-term development, increase opportunities to participate in a variety of kinds of work, handle increasingly significant projects, and achieve eventual self-sufficiency;

(7) Establishing a program to assist new, start-up firms, particularly in fields in which DBE participation has historically been low;

(8) Ensuring distribution of your DBE directory, through print and electronic means, to the widest feasible universe of potential prime contractors; and

(9) Assisting DBEs, and other small businesses, to develop their capability to utilize emerging technology and conduct business through electronic media.

(c) Each time you submit your overall goal for review by the concerned operating administration, you must also submit your projection of the portion of the goal that you expect to meet through race-neutral means and your basis for that projection. This projection is subject to approval by the concerned operating administration, in conjunction with its review of your overall goal.

## 49 CFR Subtitle A (10-1-10 Edition)

(d) You must establish contract goals to meet any portion of your overall goal you do not project being able to meet using race-neutral means.

(e) The following provisions apply to the use of contract goals:

(1) You may use contract goals only on those DOT-assisted contracts that have subcontracting possibilities.

(2) You are not required to set a contract goal on every DOT-assisted contract. You are not required to set each contract goal at the same percentage level as the overall goal. The goal for a specific contract may be higher or lower than that percentage level of the overall goal, depending on such factors as the type of work involved, the location of the work, and the availability of DBEs for the work of the particular contract. However, over the period covered by your overall goal, you must set contract goals so that they will cumulatively result in meeting any portion of your overall goal you do not project being able to meet through the use of race-neutral means.

(3) Operating administration approval of each contract goal is not necessarily required. However, operating administrations may review and approve or disapprove any contract goal you establish.

(4) Your contract goals must provide for participation by all certified DBEs and must not be subdivided into group-specific goals.

(f) To ensure that your DBE program continues to be narrowly tailored to overcome the effects of discrimination, you must adjust your use of contract goals as follows:

(1) If your approved projection under paragraph (c) of this section estimates that you can meet your entire overall goal for a given year through race-neutral means, you must implement your program without setting contract goals during that year.

*Example to paragraph (f)(1):* Your overall goal for Year I is 12 percent. You estimate that you can obtain 12 percent or more DBE participation through the use of race-neutral measures, without any use of contract goals. In this case, you do not set any contract goals for the contracts that will be performed in Year I.

(2) If, during the course of any year in which you are using contract goals,

you determine that you will exceed your overall goal, you must reduce or eliminate the use of contract goals to the extent necessary to ensure that the use of contract goals does not result in exceeding the overall goal. If you determine that you will fall short of your overall goal, then you must make appropriate modifications in your use of race-neutral and/or race-conscious measures to allow you to meet the overall goal.

*Example to paragraph (f)(2):* In Year II, your overall goal is 12 percent. You have estimated that you can obtain 5 percent DBE participation through use of race-neutral measures. You therefore plan to obtain the remaining 7 percent participation through use of DBE goals. By September, you have already obtained 11 percent DBE participation for the year. For contracts let during the remainder of the year, you use contract goals only to the extent necessary to obtain an additional one percent DBE participation. However, if you determine in September that your participation for the year is likely to be only 8 percent total, then you would increase your use of race-neutral and/or race-conscious means during the remainder of the year in order to achieve your overall goal.

(3) If the DBE participation you have obtained by race-neutral means alone meets or exceeds your overall goals for two consecutive years, you are not required to make a projection of the amount of your goal you can meet using such means in the next year. You do not set contract goals on any contracts in the next year. You continue using only race-neutral means to meet your overall goals unless and until you do not meet your overall goal for a year.

*Example to paragraph (f)(3):* Your overall goal for Years I and Year II is 10 percent. The DBE participation you obtain through race-neutral measures alone is 10 percent or more in each year. (For this purpose, it does not matter whether you obtained additional DBE participation through using contract goals in these years.) In Year III and following years, you do not need to make a projection under paragraph (c) of this section of the portion of your overall goal you expect to meet using race-neutral means. You simply use race-neutral means to achieve your overall goals. However, if in Year VI your DBE participation falls short of your overall goal, then you must make a paragraph (c) projection for Year VII and, if necessary, resume use of contract goals in that year.

(4) If you obtain DBE participation that exceeds your overall goal in two consecutive years through the use of contract goals (*i.e.*, not through the use of race-neutral means alone), you must reduce your use of contract goals proportionately in the following year.

*Example to paragraph (f)(4):* In Years I and II, your overall goal is 12 percent, and you obtain 14 and 16 percent DBE participation, respectively. You have exceeded your goals over the two-year period by an average of 25 percent. In Year III, your overall goal is again 12 percent, and your paragraph (c) projection estimates that you will obtain 4 percent DBE participation through race-neutral means and 8 percent through contract goals. You then reduce the contract goal projection by 25 percent (*i.e.*, from 8 to 6 percent) and set contract goals accordingly during the year. If in Year III you obtain 11 percent participation, you do not use this contract goal adjustment mechanism for Year IV, because there have not been two consecutive years of exceeding overall goals.

(g) In any year in which you project meeting part of your goal through race-neutral means and the remainder through contract goals, you must maintain data separately on DBE achievements in those contracts with and without contract goals, respectively. You must report this data to the concerned operating administration as provided in § 26.11.

**§ 26.53 What are the good faith efforts procedures recipients follow in situations where there are contract goals?**

(a) When you have established a DBE contract goal, you must award the contract only to a bidder/offeror who makes good faith efforts to meet it. You must determine that a bidder/offeror has made good faith efforts if the bidder/offeror does either of the following things:

(1) Documents that it has obtained enough DBE participation to meet the goal; or

(2) Documents that it made adequate good faith efforts to meet the goal, even though it did not succeed in obtaining enough DBE participation to do so. If the bidder/offeror does document adequate good faith efforts, you must not deny award of the contract on the basis that the bidder/offeror failed to meet the goal. See Appendix A of

## § 26.53

this part for guidance in determining the adequacy of a bidder/offeror's good faith efforts.

(b) In your solicitations for DOT-assisted contracts for which a contract goal has been established, you must require the following:

(1) Award of the contract will be conditioned on meeting the requirements of this section;

(2) All bidders/offerors will be required to submit the following information to the recipient, at the time provided in paragraph (b)(3) of this section:

(i) The names and addresses of DBE firms that will participate in the contract;

(ii) A description of the work that each DBE will perform;

(iii) The dollar amount of the participation of each DBE firm participating;

(iv) Written documentation of the bidder/offeror's commitment to use a DBE subcontractor whose participation it submits to meet a contract goal;

(v) Written confirmation from the DBE that it is participating in the contract as provided in the prime contractor's commitment; and

(vi) If the contract goal is not met, evidence of good faith efforts (see Appendix A of this part); and

(3) At your discretion, the bidder/offeror must present the information required by paragraph (b)(2) of this section—

(i) Under sealed bid procedures, as a matter of responsiveness, or with initial proposals, under contract negotiation procedures; or

(ii) At any time before you commit yourself to the performance of the contract by the bidder/offeror, as a matter of responsibility.

(c) You must make sure all information is complete and accurate and adequately documents the bidder/offeror's good faith efforts before committing yourself to the performance of the contract by the bidder/offeror.

(d) If you determine that the apparent successful bidder/offeror has failed to meet the requirements of paragraph (a) of this section, you must, before awarding the contract, provide the bidder/offeror an opportunity for administrative reconsideration.

## 49 CFR Subtitle A (10-1-10 Edition)

(1) As part of this reconsideration, the bidder/offeror must have the opportunity to provide written documentation or argument concerning the issue of whether it met the goal or made adequate good faith efforts to do so.

(2) Your decision on reconsideration must be made by an official who did not take part in the original determination that the bidder/offeror failed to meet the goal or make adequate good faith efforts to do so.

(3) The bidder/offeror must have the opportunity to meet in person with your reconsideration official to discuss the issue of whether it met the goal or made adequate good faith efforts to do so.

(4) You must send the bidder/offeror a written decision on reconsideration, explaining the basis for finding that the bidder did or did not meet the goal or make adequate good faith efforts to do so.

(5) The result of the reconsideration process is not administratively appealable to the Department of Transportation.

(e) In a "design-build" or "turnkey" contracting situation, in which the recipient lets a master contract to a contractor, who in turn lets subsequent subcontracts for the work of the project, a recipient may establish a goal for the project. The master contractor then establishes contract goals, as appropriate, for the subcontracts it lets. Recipients must maintain oversight of the master contractor's activities to ensure that they are conducted consistent with the requirements of this part.

(f)(1) You must require that a prime contractor not terminate for convenience a DBE subcontractor listed in response to paragraph (b)(2) of this section (or an approved substitute DBE firm) and then perform the work of the terminated subcontract with its own forces or those of an affiliate, without your prior written consent.

(2) When a DBE subcontractor is terminated, or fails to complete its work on the contract for any reason, you must require the prime contractor to make good faith efforts to find another DBE subcontractor to substitute for

the original DBE. These good faith efforts shall be directed at finding another DBE to perform at least the same amount of work under the contract as the DBE that was terminated, to the extent needed to meet the contract goal you established for the procurement.

(3) You must include in each prime contract a provision for appropriate administrative remedies that you will invoke if the prime contractor fails to comply with the requirements of this section.

(g) You must apply the requirements of this section to DBE bidders/offers for prime contracts. In determining whether a DBE bidder/offeror for a prime contract has met a contract goal, you count the work the DBE has committed to performing with its own forces as well as the work that it has committed to be performed by DBE subcontractors and DBE suppliers.

**§ 26.55 How is DBE participation counted toward goals?**

(a) When a DBE participates in a contract, you count only the value of the work actually performed by the DBE toward DBE goals.

(1) Count the entire amount of that portion of a construction contract (or other contract not covered by paragraph (a)(2) of this section) that is performed by the DBE's own forces. Include the cost of supplies and materials obtained by the DBE for the work of the contract, including supplies purchased or equipment leased by the DBE (except supplies and equipment the DBE subcontractor purchases or leases from the prime contractor or its affiliate).

(2) Count the entire amount of fees or commissions charged by a DBE firm for providing a bona fide service, such as professional, technical, consultant, or managerial services, or for providing bonds or insurance specifically required for the performance of a DOT-assisted contract, toward DBE goals, provided you determine the fee to be reasonable and not excessive as compared with fees customarily allowed for similar services.

(3) When a DBE subcontracts part of the work of its contract to another firm, the value of the subcontracted

work may be counted toward DBE goals only if the DBE's subcontractor is itself a DBE. Work that a DBE subcontracts to a non-DBE firm does not count toward DBE goals.

(b) When a DBE performs as a participant in a joint venture, count a portion of the total dollar value of the contract equal to the distinct, clearly defined portion of the work of the contract that the DBE performs with its own forces toward DBE goals.

(c) Count expenditures to a DBE contractor toward DBE goals only if the DBE is performing a commercially useful function on that contract.

(1) A DBE performs a commercially useful function when it is responsible for execution of the work of the contract and is carrying out its responsibilities by actually performing, managing, and supervising the work involved. To perform a commercially useful function, the DBE must also be responsible, with respect to materials and supplies used on the contract, for negotiating price, determining quality and quantity, ordering the material, and installing (where applicable) and paying for the material itself. To determine whether a DBE is performing a commercially useful function, you must evaluate the amount of work subcontracted, industry practices, whether the amount the firm is to be paid under the contract is commensurate with the work it is actually performing and the DBE credit claimed for its performance of the work, and other relevant factors.

(2) A DBE does not perform a commercially useful function if its role is limited to that of an extra participant in a transaction, contract, or project through which funds are passed in order to obtain the appearance of DBE participation. In determining whether a DBE is such an extra participant, you must examine similar transactions, particularly those in which DBEs do not participate.

(3) If a DBE does not perform or exercise responsibility for at least 30 percent of the total cost of its contract with its own work force, or the DBE subcontracts a greater portion of the work of a contract than would be expected on the basis of normal industry practice for the type of work involved,

## § 26.55

you must presume that it is not performing a commercially useful function.

(4) When a DBE is presumed not to be performing a commercially useful function as provided in paragraph (c)(3) of this section, the DBE may present evidence to rebut this presumption. You may determine that the firm is performing a commercially useful function given the type of work involved and normal industry practices.

(5) Your decisions on commercially useful function matters are subject to review by the concerned operating administration, but are not administratively appealable to DOT.

(d) Use the following factors in determining whether a DBE trucking company is performing a commercially useful function:

(1) The DBE must be responsible for the management and supervision of the entire trucking operation for which it is responsible on a particular contract, and there cannot be a contrived arrangement for the purpose of meeting DBE goals.

(2) The DBE must itself own and operate at least one fully licensed, insured, and operational truck used on the contract.

(3) The DBE receives credit for the total value of the transportation services it provides on the contract using trucks it owns, insures, and operates using drivers it employs.

(4) The DBE may lease trucks from another DBE firm, including an owner-operator who is certified as a DBE. The DBE who leases trucks from another DBE receives credit for the total value of the transportation services the lessee DBE provides on the contract.

(5) The DBE may also lease trucks from a non-DBE firm, including from an owner-operator. The DBE who leases trucks from a non-DBE is entitled to credit for the total value of transportation services provided by non-DBE lessees not to exceed the value of transportation services provided by DBE-owned trucks on the contract. Additional participation by non-DBE lessees receives credit only for the fee or commission it receives as a result of the lease arrangement. If a recipient chooses this approach, it must obtain written consent from the appro-

## 49 CFR Subtitle A (10-1-10 Edition)

priate Department Operating Administration.

*Example to this paragraph (d)(5):* DBE Firm X uses two of its own trucks on a contract. It leases two trucks from DBE Firm Y and six trucks from non-DBE Firm Z. DBE credit would be awarded for the total value of transportation services provided by Firm X and Firm Y, and may also be awarded for the total value of transportation services provided by four of the six trucks provided by Firm Z. In all, full credit would be allowed for the participation of eight trucks. With respect to the other two trucks provided by Firm Z, DBE credit could be awarded only for the fees or commissions pertaining to those trucks Firm X receives as a result of the lease with Firm Z.

(6) For purposes of this paragraph (d), a lease must indicate that the DBE has exclusive use of and control over the truck. This does not preclude the leased truck from working for others during the term of the lease with the consent of the DBE, so long as the lease gives the DBE absolute priority for use of the leased truck. Leased trucks must display the name and identification number of the DBE.

(e) Count expenditures with DBEs for materials or supplies toward DBE goals as provided in the following:

(1)(i) If the materials or supplies are obtained from a DBE manufacturer, count 100 percent of the cost of the materials or supplies toward DBE goals.

(ii) For purposes of this paragraph (e)(1), a manufacturer is a firm that operates or maintains a factory or establishment that produces, on the premises, the materials, supplies, articles, or equipment required under the contract and of the general character described by the specifications.

(2)(i) If the materials or supplies are purchased from a DBE regular dealer, count 60 percent of the cost of the materials or supplies toward DBE goals.

(ii) For purposes of this section, a regular dealer is a firm that owns, operates, or maintains a store, warehouse, or other establishment in which the materials, supplies, articles or equipment of the general character described by the specifications and required under the contract are bought, kept in stock, and regularly sold or leased to the public in the usual course of business.

(A) To be a regular dealer, the firm must be an established, regular business that engages, as its principal business and under its own name, in the purchase and sale or lease of the products in question.

(B) A person may be a regular dealer in such bulk items as petroleum products, steel, cement, gravel, stone, or asphalt without owning, operating, or maintaining a place of business as provided in this paragraph (e)(2)(ii) if the person both owns and operates distribution equipment for the products. Any supplementing of regular dealers' own distribution equipment shall be by a long-term lease agreement and not on an ad hoc or contract-by-contract basis.

(C) Packagers, brokers, manufacturers' representatives, or other persons who arrange or expedite transactions are not regular dealers within the meaning of this paragraph (e)(2).

(3) With respect to materials or supplies purchased from a DBE which is neither a manufacturer nor a regular dealer, count the entire amount of fees or commissions charged for assistance in the procurement of the materials and supplies, or fees or transportation charges for the delivery of materials or supplies required on a job site, toward DBE goals, provided you determine the fees to be reasonable and not excessive as compared with fees customarily allowed for similar services. Do not count any portion of the cost of the materials and supplies themselves toward DBE goals, however.

(f) If a firm is not currently certified as a DBE in accordance with the standards of subpart D of this part at the time of the execution of the contract, do not count the firm's participation toward any DBE goals, except as provided for in § 26.87(i).

(g) Do not count the dollar value of work performed under a contract with a firm after it has ceased to be certified toward your overall goal.

(h) Do not count the participation of a DBE subcontractor toward a contractor's final compliance with its DBE obligations on a contract until the amount being counted has actually been paid to the DBE.

[64 FR 5126, Feb. 2, 1999, as amended at 65 FR 68951, Nov. 15, 2000; 68 FR 35554, June 16, 2003]

## Subpart D—Certification Standards

### § 26.61 How are burdens of proof allocated in the certification process?

(a) In determining whether to certify a firm as eligible to participate as a DBE, you must apply the standards of this subpart.

(b) The firm seeking certification has the burden of demonstrating to you, by a preponderance of the evidence, that it meets the requirements of this subpart concerning group membership or individual disadvantage, business size, ownership, and control.

(c) You must rebuttably presume that members of the designated groups identified in § 26.67(a) are socially and economically disadvantaged. This means they do not have the burden of proving to you that they are socially and economically disadvantaged. In order to obtain the benefit of the rebuttable presumption, individuals must submit a signed, notarized statement that they are a member of one of the groups in § 26.67(a). Applicants do have the obligation to provide you information concerning their economic disadvantage (see § 26.67).

(d) Individuals who are not presumed to be socially and economically disadvantaged, and individuals concerning whom the presumption of disadvantage has been rebutted, have the burden of proving to you, by a preponderance of the evidence, that they are socially and economically disadvantaged. (See Appendix E of this part.)

(e) You must make determinations concerning whether individuals and firms have met their burden of demonstrating group membership, ownership, control, and social and economic disadvantage (where disadvantage must be demonstrated on an individual basis) by considering all the facts in the record, viewed as a whole.

[64 FR 5126, Feb. 2, 1999, as amended at 68 FR 35554, June 16, 2003]

### § 26.63 What rules govern group membership determinations?

(a)(1) If, after reviewing the signed notarized statement of membership in a presumptively disadvantaged group (see § 26.61(c)), you have a well founded reason to question the individual's claim of membership in that group,

## § 26.65

you must require the individual to present additional evidence that he or she is a member of the group.

(2) You must provide the individual a written explanation of your reasons for questioning his or her group membership and a written request for additional evidence as outlined in paragraph (b) of this section.

(3) In implementing this section, you must take special care to ensure that you do not impose a disproportionate burden on members of any particular designated group. Imposing a disproportionate burden on members of a particular group could violate § 26.7(b) and/or Title VI of the Civil Rights Act of 1964 and 49 CFR part 21.

(b) In making such a determination, you must consider whether the person has held himself out to be a member of the group over a long period of time prior to application for certification and whether the person is regarded as a member of the group by the relevant community. You may require the applicant to produce appropriate documentation of group membership.

(1) If you determine that an individual claiming to be a member of a group presumed to be disadvantaged is not a member of a designated disadvantaged group, the individual must demonstrate social and economic disadvantage on an individual basis.

(2) Your decisions concerning membership in a designated group are subject to the certification appeals procedure of § 26.89.

[64 FR 5126, Feb. 2, 1999, as amended at 68 FR 35554, June 16, 2003]

## § 26.65 What rules govern business size determinations?

(a) To be an eligible DBE, a firm (including its affiliates) must be an existing small business, as defined by Small Business Administration (SBA) standards. As a recipient, you must apply current SBA business size standard(s) found in 13 CFR part 121 appropriate to the type(s) of work the firm seeks to perform in DOT-assisted contracts.

(b) Even if it meets the requirements of paragraph (a) of this section, a firm is not an eligible DBE in any Federal fiscal year if the firm (including its affiliates) has had average annual gross receipts, as defined by SBA regulations

## 49 CFR Subtitle A (10-1-10 Edition)

(see 13 CFR 121.402), over the firm's previous three fiscal years, in excess of \$22.41 million.

(c) The Department adjusts the number in paragraph (b) of this section annually using the Department of Commerce price deflators for purchases by State and local governments as the basis for this adjustment.

[74 FR 15224, Apr. 3, 2009]

## § 26.67 What rules determine social and economic disadvantage?

(a) *Presumption of disadvantage.* (1) You must rebuttably presume that citizens of the United States (or lawfully admitted permanent residents) who are women, Black Americans, Hispanic Americans, Native Americans, Asian-Pacific Americans, Subcontinent Asian Americans, or other minorities found to be disadvantaged by the SBA, are socially and economically disadvantaged individuals. You must require applicants to submit a signed, notarized certification that each presumptively disadvantaged owner is, in fact, socially and economically disadvantaged.

(2) (i) You must require each individual owner of a firm applying to participate as a DBE (except a firm applying to participate as a DBE airport concessionaire) whose ownership and control are relied upon for DBE certification to certify that he or she has a personal net worth that does not exceed \$750,000.

(ii) You must require each individual who makes this certification to support it with a signed, notarized statement of personal net worth, with appropriate supporting documentation. This statement and documentation must not be unduly lengthy, burdensome, or intrusive.

(iii) In determining an individual's net worth, you must observe the following requirements:

(A) Exclude an individual's ownership interest in the applicant firm;

(B) Exclude the individual's equity in his or her primary residence (except any portion of such equity that is attributable to excessive withdrawals from the applicant firm).

(C) Do not use a contingent liability to reduce an individual's net worth.

(D) With respect to assets held in vested pension plans, Individual Retirement Accounts, 401(k) accounts, or other retirement savings or investment programs in which the assets cannot be distributed to the individual at the present time without significant adverse tax or interest consequences, include only the present value of such assets, less the tax and interest penalties that would accrue if the asset were distributed at the present time.

(iv) Notwithstanding any provision of Federal or state law, you must not release an individual's personal net worth statement nor any documentation supporting it to any third party without the written consent of the submitter. *Provided*, that you must transmit this information to DOT in any certification appeal proceeding under § 26.89 in which the disadvantaged status of the individual is in question.

(b) *Rebuttal of presumption of disadvantage.* (1) If the statement of personal net worth that an individual submits under paragraph (a)(2) of this section shows that the individual's personal net worth exceeds \$750,000, the individual's presumption of economic disadvantage is rebutted. You are not required to have a proceeding under paragraph (b)(2) of this section in order to rebut the presumption of economic disadvantage in this case.

(2) If you have a reasonable basis to believe that an individual who is a member of one of the designated groups is not, in fact, socially and/or economically disadvantaged you may, at any time, start a proceeding to determine whether the presumption should be regarded as rebutted with respect to that individual. Your proceeding must follow the procedures of § 26.87.

(3) In such a proceeding, you have the burden of demonstrating, by a preponderance of the evidence, that the individual is not socially and economically disadvantaged. You may require the individual to produce information relevant to the determination of his or her disadvantage.

(4) When an individual's presumption of social and/or economic disadvantage has been rebutted, his or her ownership and control of the firm in question cannot be used for purposes of DBE eligibility under this subpart unless and

until he or she makes an individual showing of social and/or economic disadvantage. If the basis for rebutting the presumption is a determination that the individual's personal net worth exceeds \$750,000, the individual is no longer eligible for participation in the program and cannot regain eligibility by making an individual showing of disadvantage.

(c) [Reserved]

(d) *Individual determinations of social and economic disadvantage.* Firms owned and controlled by individuals who are not presumed to be socially and economically disadvantaged (including individuals whose presumed disadvantage has been rebutted) may apply for DBE certification. You must make a case-by-case determination of whether each individual whose ownership and control are relied upon for DBE certification is socially and economically disadvantaged. In such a proceeding, the applicant firm has the burden of demonstrating to you, by a preponderance of the evidence, that the individuals who own and control it are socially and economically disadvantaged. An individual whose personal net worth exceeds \$750,000 shall not be deemed to be economically disadvantaged. In making these determinations, use the guidance found in Appendix E of this part. You must require that applicants provide sufficient information to permit determinations under the guidance of Appendix E of this part.

[64 FR 5126, Feb. 2, 1999, as amended at 64 FR 34570, June 28, 1999; 68 FR 35554, June 16, 2003]

#### **§ 26.69 What rules govern determinations of ownership?**

(a) In determining whether the socially and economically disadvantaged participants in a firm own the firm, you must consider all the facts in the record, viewed as a whole.

(b) To be an eligible DBE, a firm must be at least 51 percent owned by socially and economically disadvantaged individuals.

(1) In the case of a corporation, such individuals must own at least 51 percent of the each class of voting stock outstanding and 51 percent of the aggregate of all stock outstanding.

§ 26.69

(2) In the case of a partnership, 51 percent of each class of partnership interest must be owned by socially and economically disadvantaged individuals. Such ownership must be reflected in the firm's partnership agreement.

(3) In the case of a limited liability company, at least 51 percent of each class of member interest must be owned by socially and economically disadvantaged individuals.

(c) The firm's ownership by socially and economically disadvantaged individuals must be real, substantial, and continuing, going beyond pro forma ownership of the firm as reflected in ownership documents. The disadvantaged owners must enjoy the customary incidents of ownership, and share in the risks and profits commensurate with their ownership interests, as demonstrated by the substance, not merely the form, of arrangements.

(d) All securities that constitute ownership of a firm shall be held directly by disadvantaged persons. Except as provided in this paragraph (d), no securities or assets held in trust, or by any guardian for a minor, are considered as held by disadvantaged persons in determining the ownership of a firm. However, securities or assets held in trust are regarded as held by a disadvantaged individual for purposes of determining ownership of the firm, if—

(1) The beneficial owner of securities or assets held in trust is a disadvantaged individual, and the trustee is the same or another such individual; or

(2) The beneficial owner of a trust is a disadvantaged individual who, rather than the trustee, exercises effective control over the management, policy-making, and daily operational activities of the firm. Assets held in a revocable living trust may be counted only in the situation where the same disadvantaged individual is the sole grantor, beneficiary, and trustee.

(e) The contributions of capital or expertise by the socially and economically disadvantaged owners to acquire their ownership interests must be real and substantial. Examples of insufficient contributions include a promise to contribute capital, an unsecured note payable to the firm or an owner who is not a disadvantaged individual, or mere participation in a firm's ac-

49 CFR Subtitle A (10-1-10 Edition)

tivities as an employee. Debt instruments from financial institutions or other organizations that lend funds in the normal course of their business do not render a firm ineligible, even if the debtor's ownership interest is security for the loan.

(f) The following requirements apply to situations in which expertise is relied upon as part of a disadvantaged owner's contribution to acquire ownership:

- (1) The owner's expertise must be—
  - (i) In a specialized field;
  - (ii) Of outstanding quality;
  - (iii) In areas critical to the firm's operations;
  - (iv) Indispensable to the firm's potential success;
  - (v) Specific to the type of work the firm performs; and
  - (vi) Documented in the records of the firm. These records must clearly show the contribution of expertise and its value to the firm.

(2) The individual whose expertise is relied upon must have a significant financial investment in the firm.

(g) You must always deem as held by a socially and economically disadvantaged individual, for purposes of determining ownership, all interests in a business or other assets obtained by the individual—

(1) As the result of a final property settlement or court order in a divorce or legal separation, provided that no term or condition of the agreement or divorce decree is inconsistent with this section; or

(2) Through inheritance, or otherwise because of the death of the former owner.

(h)(1) You must presume as not being held by a socially and economically disadvantaged individual, for purposes of determining ownership, all interests in a business or other assets obtained by the individual as the result of a gift, or transfer without adequate consideration, from any non-disadvantaged individual or non-DBE firm who is—

(i) Involved in the same firm for which the individual is seeking certification, or an affiliate of that firm;

(ii) Involved in the same or a similar line of business; or

(iii) Engaged in an ongoing business relationship with the firm, or an affiliate of the firm, for which the individual is seeking certification.

(2) To overcome this presumption and permit the interests or assets to be counted, the disadvantaged individual must demonstrate to you, by clear and convincing evidence, that—

(i) The gift or transfer to the disadvantaged individual was made for reasons other than obtaining certification as a DBE; and

(ii) The disadvantaged individual actually controls the management, policy, and operations of the firm, notwithstanding the continuing participation of a non-disadvantaged individual who provided the gift or transfer.

(i) You must apply the following rules in situations in which marital assets form a basis for ownership of a firm:

(1) When marital assets (other than the assets of the business in question), held jointly or as community property by both spouses, are used to acquire the ownership interest asserted by one spouse, you must deem the ownership interest in the firm to have been acquired by that spouse with his or her own individual resources, provided that the other spouse irrevocably renounces and transfers all rights in the ownership interest in the manner sanctioned by the laws of the state in which either spouse or the firm is domiciled. You do not count a greater portion of joint or community property assets toward ownership than state law would recognize as belonging to the socially and economically disadvantaged owner of the applicant firm.

(2) A copy of the document legally transferring and renouncing the other spouse's rights in the jointly owned or community assets used to acquire an ownership interest in the firm must be included as part of the firm's application for DBE certification.

(j) You may consider the following factors in determining the ownership of a firm. However, you must not regard a contribution of capital as failing to be real and substantial, or find a firm ineligible, solely because—

(1) A socially and economically disadvantaged individual acquired his or her ownership interest as the result of

a gift, or transfer without adequate consideration, other than the types set forth in paragraph (h) of this section;

(2) There is a provision for the co-signature of a spouse who is not a socially and economically disadvantaged individual on financing agreements, contracts for the purchase or sale of real or personal property, bank signature cards, or other documents; or

(3) Ownership of the firm in question or its assets is transferred for adequate consideration from a spouse who is not a socially and economically disadvantaged individual to a spouse who is such an individual. In this case, you must give particularly close and careful scrutiny to the ownership and control of a firm to ensure that it is owned and controlled, in substance as well as in form, by a socially and economically disadvantaged individual.

#### **§ 26.71 What rules govern determinations concerning control?**

(a) In determining whether socially and economically disadvantaged owners control a firm, you must consider all the facts in the record, viewed as a whole.

(b) Only an independent business may be certified as a DBE. An independent business is one the viability of which does not depend on its relationship with another firm or firms.

(1) In determining whether a potential DBE is an independent business, you must scrutinize relationships with non-DBE firms, in such areas as personnel, facilities, equipment, financial and/or bonding support, and other resources.

(2) You must consider whether present or recent employer/employee relationships between the disadvantaged owner(s) of the potential DBE and non-DBE firms or persons associated with non-DBE firms compromise the independence of the potential DBE firm.

(3) You must examine the firm's relationships with prime contractors to determine whether a pattern of exclusive or primary dealings with a prime contractor compromises the independence of the potential DBE firm.

(4) In considering factors related to the independence of a potential DBE

## § 26.71

firm, you must consider the consistency of relationships between the potential DBE and non-DBE firms with normal industry practice.

(c) A DBE firm must not be subject to any formal or informal restrictions which limit the customary discretion of the socially and economically disadvantaged owners. There can be no restrictions through corporate charter provisions, by-law provisions, contracts or any other formal or informal devices (e.g., cumulative voting rights, voting powers attached to different classes of stock, employment contracts, requirements for concurrence by non-disadvantaged partners, conditions precedent or subsequent, executory agreements, voting trusts, restrictions on or assignments of voting rights) that prevent the socially and economically disadvantaged owners, without the cooperation or vote of any non-disadvantaged individual, from making any business decision of the firm. This paragraph does not preclude a spousal co-signature on documents as provided for in § 26.69(j)(2).

(d) The socially and economically disadvantaged owners must possess the power to direct or cause the direction of the management and policies of the firm and to make day-to-day as well as long-term decisions on matters of management, policy and operations.

(1) A disadvantaged owner must hold the highest officer position in the company (e.g., chief executive officer or president).

(2) In a corporation, disadvantaged owners must control the board of directors.

(3) In a partnership, one or more disadvantaged owners must serve as general partners, with control over all partnership decisions.

(e) Individuals who are not socially and economically disadvantaged may be involved in a DBE firm as owners, managers, employees, stockholders, officers, and/or directors. Such individuals must not, however, possess or exercise the power to control the firm, or be disproportionately responsible for the operation of the firm.

(f) The socially and economically disadvantaged owners of the firm may delegate various areas of the management, policymaking, or daily oper-

## 49 CFR Subtitle A (10-1-10 Edition)

ations of the firm to other participants in the firm, regardless of whether these participants are socially and economically disadvantaged individuals. Such delegations of authority must be revocable, and the socially and economically disadvantaged owners must retain the power to hire and fire any person to whom such authority is delegated. The managerial role of the socially and economically disadvantaged owners in the firm's overall affairs must be such that the recipient can reasonably conclude that the socially and economically disadvantaged owners actually exercise control over the firm's operations, management, and policy.

(g) The socially and economically disadvantaged owners must have an overall understanding of, and managerial and technical competence and experience directly related to, the type of business in which the firm is engaged and the firm's operations. The socially and economically disadvantaged owners are not required to have experience or expertise in every critical area of the firm's operations, or to have greater experience or expertise in a given field than managers or key employees. The socially and economically disadvantaged owners must have the ability to intelligently and critically evaluate information presented by other participants in the firm's activities and to use this information to make independent decisions concerning the firm's daily operations, management, and policymaking. Generally, expertise limited to office management, administration, or bookkeeping functions unrelated to the principal business activities of the firm is insufficient to demonstrate control.

(h) If state or local law requires the persons to have a particular license or other credential in order to own and/or control a certain type of firm, then the socially and economically disadvantaged persons who own and control a potential DBE firm of that type must possess the required license or credential. If state or local law does not require such a person to have such a license or credential to own and/or control a firm, you must not deny certification solely on the ground that the person lacks the license or credential.

However, you may take into account the absence of the license or credential as one factor in determining whether the socially and economically disadvantaged owners actually control the firm.

(i)(1) You may consider differences in remuneration between the socially and economically disadvantaged owners and other participants in the firm in determining whether to certify a firm as a DBE. Such consideration shall be in the context of the duties of the persons involved, normal industry practices, the firm's policy and practice concerning reinvestment of income, and any other explanations for the differences proffered by the firm. You may determine that a firm is controlled by its socially and economically disadvantaged owner although that owner's remuneration is lower than that of some other participants in the firm.

(2) In a case where a non-disadvantaged individual formerly controlled the firm, and a socially and economically disadvantaged individual now controls it, you may consider a difference between the remuneration of the former and current controller of the firm as a factor in determining who controls the firm, particularly when the non-disadvantaged individual remains involved with the firm and continues to receive greater compensation than the disadvantaged individual.

(j) In order to be viewed as controlling a firm, a socially and economically disadvantaged owner cannot engage in outside employment or other business interests that conflict with the management of the firm or prevent the individual from devoting sufficient time and attention to the affairs of the firm to control its activities. For example, absentee ownership of a business and part-time work in a full-time firm are not viewed as constituting control. However, an individual could be viewed as controlling a part-time business that operates only on evenings and/or weekends, if the individual controls it all the time it is operating.

(k)(1) A socially and economically disadvantaged individual may control a firm even though one or more of the individual's immediate family mem-

bers (who themselves are not socially and economically disadvantaged individuals) participate in the firm as a manager, employee, owner, or in another capacity. Except as otherwise provided in this paragraph, you must make a judgment about the control the socially and economically disadvantaged owner exercises vis-a-vis other persons involved in the business as you do in other situations, without regard to whether or not the other persons are immediate family members.

(2) If you cannot determine that the socially and economically disadvantaged owners—as distinct from the family as a whole—control the firm, then the socially and economically disadvantaged owners have failed to carry their burden of proof concerning control, even though they may participate significantly in the firm's activities.

(1) Where a firm was formerly owned and/or controlled by a non-disadvantaged individual (whether or not an immediate family member), ownership and/or control were transferred to a socially and economically disadvantaged individual, and the non-disadvantaged individual remains involved with the firm in any capacity, the disadvantaged individual now owning the firm must demonstrate to you, by clear and convincing evidence, that:

(1) The transfer of ownership and/or control to the disadvantaged individual was made for reasons other than obtaining certification as a DBE; and

(2) The disadvantaged individual actually controls the management, policy, and operations of the firm, notwithstanding the continuing participation of a non-disadvantaged individual who formerly owned and/or controlled the firm.

(m) In determining whether a firm is controlled by its socially and economically disadvantaged owners, you may consider whether the firm owns equipment necessary to perform its work. However, you must not determine that a firm is not controlled by socially and economically disadvantaged individuals solely because the firm leases, rather than owns, such equipment, where leasing equipment is a normal industry practice and the lease does not involve a relationship with a prime

## § 26.73

contractor or other party that compromises the independence of the firm.

(n) You must grant certification to a firm only for specific types of work in which the socially and economically disadvantaged owners have the ability to control the firm. To become certified in an additional type of work, the firm need demonstrate to you only that its socially and economically disadvantaged owners are able to control the firm with respect to that type of work. You may not, in this situation, require that the firm be recertified or submit a new application for certification, but you must verify the disadvantaged owner's control of the firm in the additional type of work.

(o) A business operating under a franchise or license agreement may be certified if it meets the standards in this subpart and the franchiser or licensor is not affiliated with the franchisee or licensee. In determining whether affiliation exists, you should generally not consider the restraints relating to standardized quality, advertising, accounting format, and other provisions imposed on the franchisee or licensee by the franchise agreement or license, provided that the franchisee or licensee has the right to profit from its efforts and bears the risk of loss commensurate with ownership. Alternatively, even though a franchisee or licensee may not be controlled by virtue of such provisions in the franchise agreement or license, affiliation could arise through other means, such as common management or excessive restrictions on the sale or transfer of the franchise interest or license.

(p) In order for a partnership to be controlled by socially and economically disadvantaged individuals, any non-disadvantaged partners must not have the power, without the specific written concurrence of the socially and economically disadvantaged partner(s), to contractually bind the partnership or subject the partnership to contract or tort liability.

(q) The socially and economically disadvantaged individuals controlling a firm may use an employee leasing company. The use of such a company does not preclude the socially and economically disadvantaged individuals from controlling their firm if they continue

## 49 CFR Subtitle A (10-1-10 Edition)

to maintain an employer-employee relationship with the leased employees. This includes being responsible for hiring, firing, training, assigning, and otherwise controlling the on-the-job activities of the employees, as well as ultimate responsibility for wage and tax obligations related to the employees.

### § 26.73 What are other rules affecting certification?

(a)(1) Consideration of whether a firm performs a commercially useful function or is a regular dealer pertains solely to counting toward DBE goals the participation of firms that have already been certified as DBEs. Except as provided in paragraph (a)(2) of this section, you must not consider commercially useful function issues in any way in making decisions about whether to certify a firm as a DBE.

(2) You may consider, in making certification decisions, whether a firm has exhibited a pattern of conduct indicating its involvement in attempts to evade or subvert the intent or requirements of the DBE program.

(b) You must evaluate the eligibility of a firm on the basis of present circumstances. You must not refuse to certify a firm based solely on historical information indicating a lack of ownership or control of the firm by socially and economically disadvantaged individuals at some time in the past, if the firm currently meets the ownership and control standards of this part. Nor must you refuse to certify a firm solely on the basis that it is a newly formed firm.

(c) DBE firms and firms seeking DBE certification shall cooperate fully with your requests (and DOT requests) for information relevant to the certification process. Failure or refusal to provide such information is a ground for a denial or removal of certification.

(d) Only firms organized for profit may be eligible DBEs. Not-for-profit organizations, even though controlled by socially and economically disadvantaged individuals, are not eligible to be certified as DBEs.

(e) An eligible DBE firm must be owned by individuals who are socially and economically disadvantaged. Except as provided in this paragraph, a

firm that is not owned by such individuals, but instead is owned by another firm—even a DBE firm—cannot be an eligible DBE.

(1) If socially and economically disadvantaged individuals own and control a firm through a parent or holding company, established for tax, capitalization or other purposes consistent with industry practice, and the parent or holding company in turn owns and controls an operating subsidiary, you may certify the subsidiary if it otherwise meets all requirements of this subpart. In this situation, the individual owners and controllers of the parent or holding company are deemed to control the subsidiary through the parent or holding company.

(2) You may certify such a subsidiary only if there is cumulatively 51 percent ownership of the subsidiary by socially and economically disadvantaged individuals. The following examples illustrate how this cumulative ownership provision works:

*Example 1:* Socially and economically disadvantaged individuals own 100 percent of a holding company, which has a wholly-owned subsidiary. The subsidiary may be certified, if it meets all other requirements.

*Example 2:* Disadvantaged individuals own 100 percent of the holding company, which owns 51 percent of a subsidiary. The subsidiary may be certified, if all other requirements are met.

*Example 3:* Disadvantaged individuals own 80 percent of the holding company, which in turn owns 70 percent of a subsidiary. In this case, the cumulative ownership of the subsidiary by disadvantaged individuals is 56 percent (80 percent of the 70 percent). This is more than 51 percent, so you may certify the subsidiary, if all other requirements are met.

*Example 4:* Same as Example 2 or 3, but someone other than the socially and economically disadvantaged owners of the parent or holding company controls the subsidiary. Even though the subsidiary is owned by disadvantaged individuals, through the holding or parent company, you cannot certify it because it fails to meet control requirements.

*Example 5:* Disadvantaged individuals own 60 percent of the holding company, which in turn owns 51 percent of a subsidiary. In this case, the cumulative ownership of the subsidiary by disadvantaged individuals is about 31 percent. This is less than 51 percent, so you cannot certify the subsidiary.

*Example 6:* The holding company, in addition to the subsidiary seeking certification, owns several other companies. The combined

gross receipts of the holding companies and its subsidiaries are greater than the size standard for the subsidiary seeking certification and/or the gross receipts cap of § 26.65(b). Under the rules concerning affiliation, the subsidiary fails to meet the size standard and cannot be certified.

(f) Recognition of a business as a separate entity for tax or corporate purposes is not necessarily sufficient to demonstrate that a firm is an independent business, owned and controlled by socially and economically disadvantaged individuals.

(g) You must not require a DBE firm to be prequalified as a condition for certification unless the recipient requires all firms that participate in its contracts and subcontracts to be prequalified.

(h) A firm that is owned by an Indian tribe or Native Hawaiian organization, rather than by Indians or Native Hawaiians as individuals, may be eligible for certification. Such a firm must meet the size standards of § 26.35. Such a firm must be controlled by socially and economically disadvantaged individuals, as provided in § 26.71.

(i) The following special rules apply to the certification of firms related to Alaska Native Corporations (ANCs).

(1) Notwithstanding any other provisions of this subpart, a direct or indirect subsidiary corporation, joint venture, or partnership entity of an ANC is eligible for certification as a DBE if it meets all of the following requirements:

(i) The Settlement Common Stock of the underlying ANC and other stock of the ANC held by holders of the Settlement Common Stock and by Natives and descendants of Natives represents a majority of both the total equity of the ANC and the total voting power of the corporation for purposes of electing directors;

(ii) The shares of stock or other units of common ownership interest in the subsidiary, joint venture, or partnership entity held by the ANC and by holders of its Settlement Common Stock represent a majority of both the total equity of the entity and the total voting power of the entity for the purpose of electing directors, the general partner, or principal officers; and

(iii) The subsidiary, joint venture, or partnership entity has been certified

by the Small Business Administration under the 8(a) or small disadvantaged business program.

(2) As a recipient to whom an ANC-related entity applies for certification, you do not use the DOT uniform application form (*see* Appendix F of this part). You must obtain from the firm documentation sufficient to demonstrate that entity meets the requirements of paragraph (i)(1) of this section. You must also obtain sufficient information about the firm to allow you to administer your program (*e.g.*, information that would appear in your DBE Directory).

(3) If an ANC-related firm does not meet all the conditions of paragraph (i)(1) of this section, then it must meet the requirements of paragraph (h) of this section in order to be certified, on the same basis as firms owned by Indian Tribes or Native Hawaiian Organizations.

[64 FR 5126, Feb. 2, 1999, as amended at 68 FR 35555, June 16, 2003]

### Subpart E—Certification Procedures

#### § 26.81 What are the requirements for Unified Certification Programs?

(a) You and all other DOT recipients in your state must participate in a Unified Certification Program (UCP).

(1) Within three years of March 4, 1999, you and the other recipients in your state must sign an agreement establishing the UCP for that state and submit the agreement to the Secretary for approval. The Secretary may, on the basis of extenuating circumstances shown by the recipients in the state, extend this deadline for no more than one additional year.

(2) The agreement must provide for the establishment of a UCP meeting all the requirements of this section. The agreement must specify that the UCP will follow all certification procedures and standards of this part, on the same basis as recipients; that the UCP shall cooperate fully with oversight, review, and monitoring activities of DOT and its operating administrations; and that the UCP shall implement DOT directives and guidance concerning certification matters. The agreement shall also commit recipients to ensuring

that the UCP has sufficient resources and expertise to carry out the requirements of this part. The agreement shall include an implementation schedule ensuring that the UCP is fully operational no later than 18 months following the approval of the agreement by the Secretary.

(3) Subject to approval by the Secretary, the UCP in each state may take any form acceptable to the recipients in that state.

(4) The Secretary shall review the UCP and approve it, disapprove it, or remand it to the recipients in the state for revisions. A complete agreement which is not disapproved or remanded within 180 days of its receipt is deemed to be accepted.

(5) If you and the other recipients in your state fail to meet the deadlines set forth in this paragraph (a), you shall have the opportunity to make an explanation to the Secretary why a deadline could not be met and why meeting the deadline was beyond your control. If you fail to make such an explanation, or the explanation does not justify the failure to meet the deadline, the Secretary shall direct you to complete the required action by a date certain. If you and the other recipients fail to carry out this direction in a timely manner, you are collectively in noncompliance with this part.

(b) The UCP shall make all certification decisions on behalf of all DOT recipients in the state with respect to participation in the DOT DBE Program.

(1) Certification decisions by the UCP shall be binding on all DOT recipients within the state.

(2) The UCP shall provide "one-stop shopping" to applicants for certification, such that an applicant is required to apply only once for a DBE certification that will be honored by all recipients in the state.

(3) All obligations of recipients with respect to certification and nondiscrimination must be carried out by UCPs, and recipients may use only UCPs that comply with the certification and nondiscrimination requirements of this part.

(c) All certifications by UCPs shall be pre-certifications; i.e., certifications that have been made final before the

due date for bids or offers on a contract on which a firm seeks to participate as a DBE.

(d) A UCP is not required to process an application for certification from a firm having its principal place of business outside the state if the firm is not certified by the UCP in the state in which it maintains its principal place of business. The "home state" UCP shall share its information and documents concerning the firm with other UCPs that are considering the firm's application.

(e) Subject to DOT approval as provided in this section, the recipients in two or more states may form a regional UCP. UCPs may also enter into written reciprocity agreements with other UCPs. Such an agreement shall outline the specific responsibilities of each participant. A UCP may accept the certification of any other UCP or DOT recipient.

(f) Pending the establishment of UCPs meeting the requirements of this section, you may enter into agreements with other recipients, on a regional or inter-jurisdictional basis, to perform certification functions required by this part. You may also grant reciprocity to other recipient's certification decisions.

(g) Each UCP shall maintain a unified DBE directory containing, for all firms certified by the UCP (including those from other states certified under the provisions of this section), the information required by § 26.31. The UCP shall make the directory available to the public electronically, on the internet, as well as in print. The UCP shall update the electronic version of the directory by including additions, deletions, and other changes as soon as they are made.

(h) Except as otherwise specified in this section, all provisions of this subpart and subpart D of this part pertaining to recipients also apply to UCPs.

**§ 26.83 What procedures do recipients follow in making certification decisions?**

(a) You must ensure that only firms certified as eligible DBEs under this section participate as DBEs in your program.

(b) You must determine the eligibility of firms as DBEs consistent with the standards of subpart D of this part. When a UCP is formed, the UCP must meet all the requirements of subpart D of this part and this subpart that recipients are required to meet.

(c) You must take all the following steps in determining whether a DBE firm meets the standards of subpart D of this part:

(1) Perform an on-site visit to the offices of the firm. You must interview the principal officers of the firm and review their résumés and/or work histories. You must also perform an on-site visit to job sites if there are such sites on which the firm is working at the time of the eligibility investigation in your jurisdiction or local area. You may rely upon the site visit report of any other recipient with respect to a firm applying for certification;

(2) If the firm is a corporation, analyze the ownership of stock in the firm;

(3) Analyze the bonding and financial capacity of the firm;

(4) Determine the work history of the firm, including contracts it has received and work it has completed;

(5) Obtain a statement from the firm of the type of work it prefers to perform as part of the DBE program and its preferred locations for performing the work, if any;

(6) Obtain or compile a list of the equipment owned by or available to the firm and the licenses the firm and its key personnel possess to perform the work it seeks to do as part of the DBE program;

(7) Require potential DBEs to complete and submit an appropriate application form, unless the potential DBE is an SBA certified firm applying pursuant to the DOT/SBA MOU.

(i) You must use the application form provided in Appendix F to this part without change or revision. However, you may provide in your DBE program, with the approval of the concerned operating administration, for supplementing the form by requesting additional information not inconsistent with this part.

(ii) You must make sure that the applicant attests to the accuracy and truthfulness of the information on the

## § 26.83

application form. This shall be done either in the form of an affidavit sworn to by the applicant before a person who is authorized by state law to administer oaths or in the form of an unsworn declaration executed under penalty of perjury of the laws of the United States.

(iii) You must review all information on the form prior to making a decision about the eligibility of the firm.

(d) When another recipient, in connection with its consideration of the eligibility of a firm, makes a written request for certification information you have obtained about that firm (e.g., including application materials or the report of a site visit, if you have made one to the firm), you must promptly make the information available to the other recipient.

(e) When another DOT recipient has certified a firm, you have discretion to take any of the following actions:

(1) Certify the firm in reliance on the certification decision of the other recipient;

(2) Make an independent certification decision based on documentation provided by the other recipient, augmented by any additional information you require the applicant to provide; or

(3) Require the applicant to go through your application process without regard to the action of the other recipient.

(f) Subject to the approval of the concerned operating administration as part of your DBE program, you may impose a reasonable application fee for certification. Fee waivers shall be made in appropriate cases.

(g) You must safeguard from disclosure to unauthorized persons information gathered as part of the certification process that may reasonably be regarded as proprietary or other confidential business information, consistent with applicable Federal, state, and local law.

(h) Once you have certified a DBE, it shall remain certified for a period of at least three years unless and until its certification has been removed through the procedures of § 26.87. You may not require DBEs to reapply for certification as a condition of continuing to participate in the program during this three-year period, unless the factual

## 49 CFR Subtitle A (10-1-10 Edition)

basis on which the certification was made changes.

(i) If you are a DBE, you must inform the recipient or UCP in writing of any change in circumstances affecting your ability to meet size, disadvantaged status, ownership, or control requirements of this part or any material change in the information provided in your application form.

(1) Changes in management responsibility among members of a limited liability company are covered by this requirement.

(2) You must attach supporting documentation describing in detail the nature of such changes.

(3) The notice must take the form of an affidavit sworn to by the applicant before a person who is authorized by state law to administer oaths or of an unsworn declaration executed under penalty of perjury of the laws of the United States. You must provide the written notification within 30 days of the occurrence of the change. If you fail to make timely notification of such a change, you will be deemed to have failed to cooperate under § 26.109(c).

(j) If you are a DBE, you must provide to the recipient, every year on the anniversary of the date of your certification, an affidavit sworn to by the firm's owners before a person who is authorized by state law to administer oaths or an unsworn declaration executed under penalty of perjury of the laws of the United States. This affidavit must affirm that there have been no changes in the firm's circumstances affecting its ability to meet size, disadvantaged status, ownership, or control requirements of this part or any material changes in the information provided in its application form, except for changes about which you have notified the recipient under paragraph (i) of this section. The affidavit shall specifically affirm that your firm continues to meet SBA business size criteria and the overall gross receipts cap of this part, documenting this affirmation with supporting documentation of your firm's size and gross receipts. If you fail to provide this affidavit in a timely manner, you will be deemed to have failed to cooperate under § 26.109(c).

(k) If you are a recipient, you must make decisions on applications for certification within 90 days of receiving from the applicant firm all information required under this part. You may extend this time period once, for no more than an additional 60 days, upon written notice to the firm, explaining fully and specifically the reasons for the extension. You may establish a different time frame in your DBE program, upon a showing that this time frame is not feasible, and subject to the approval of the concerned operating administration. Your failure to make a decision by the applicable deadline under this paragraph is deemed a constructive denial of the application, on the basis of which the firm may appeal to DOT under § 26.89.

[64 FR 5126, Feb. 2, 1999, as amended at 68 FR 35555, June 16, 2003]

**§ 26.84 How do recipients process applications submitted pursuant to the DOT/SBA MOU?**

(a) When an SBA-certified firm applies for certification pursuant to the DOT/SBA MOU, you must accept the certification applications, forms and packages submitted by a firm to the SBA for either the 8(a) BD or SDB programs, in lieu of requiring the applicant firm to complete your own application forms and packages. The applicant may submit the package directly, or may request that the SBA forward the package to you. Pursuant to the MOU, the SBA will forward the package within thirty days.

(b) If necessary, you may request additional relevant information from the SBA. The SBA will provide this additional material within forty-five days of your written request.

(c) Before certifying a firm based on its 8(a) BD or SDB certification, you must conduct an on-site review of the firm (see § 26.83(c)(1)). If the SBA conducted an on-site review, you may rely on the SBA's report of the on-site review. In connection with this review, you may also request additional relevant information from the firm.

(d) Unless you determine, based on the on-site review and information obtained in connection with it, that the firm does not meet the eligibility re-

quirements of Subpart D of this part, you must certify the firm.

(e) You are not required to process an application for certification from an SBA-certified firm having its principal place of business outside the state(s) in which you operate unless there is a report of a "home state" on-site review on which you may rely.

(f) You are not required to process an application for certification from an SBA-certified firm if the firm does not provide products or services that you use in your DOT-assisted programs or airport concessions.

[68 FR 35555, June 16, 2003]

**§ 26.85 How do recipients respond to requests from DBE-certified firms or the SBA made pursuant to the DOT/SBA MOU?**

(a) Upon receipt of a signed, written request from a DBE-certified firm, you must transfer to the SBA a copy of the firm's application package. You must transfer this information within thirty days of receipt of the request.

(b) If necessary, the SBA may make a written request to the recipient for additional materials (e.g., the report of the on-site review). You must provide a copy of this material to the SBA within forty-five days of the additional request.

(c) You must provide appropriate assistance to SBA-certified firms, including providing information pertaining to the DBE application process, filing locations, required documentation and status of applications.

[68 FR 35555, June 16, 2003]

**§ 26.86 What rules govern recipients' denials of initial requests for certification?**

(a) When you deny a request by a firm, which is not currently certified with you, to be certified as a DBE, you must provide the firm a written explanation of the reasons for the denial, specifically referencing the evidence in the record that supports each reason for the denial. All documents and other information on which the denial is based must be made available to the applicant, on request.

(b) When you deny DBE certification to a firm certified by the SBA, you must notify the SBA in writing. The

## § 26.87

notification must include the reason for denial.

(c) When a firm is denied certification, you must establish a time period of no more than twelve months that must elapse before the firm may reapply to the recipient for certification. You may provide, in your DBE program, subject to approval by the concerned operating administration, a shorter waiting period for reapplication. The time period for reapplication begins to run on the date the explanation required by paragraph (a) of this section is received by the firm.

(d) When you make an administratively final denial of certification concerning a firm, the firm may appeal the denial to the Department under § 26.89.

[64 FR 5126, Feb. 2, 1999. Redesignated and amended at 68 FR 35555, June 16, 2003]

### § 26.87 What procedures does a recipient use to remove a DBE's eligibility?

(a) *Ineligibility complaints.* (1) Any person may file with you a written complaint alleging that a currently-certified firm is ineligible and specifying the alleged reasons why the firm is ineligible. You are not required to accept a general allegation that a firm is ineligible or an anonymous complaint. The complaint may include any information or arguments supporting the complainant's assertion that the firm is ineligible and should not continue to be certified. Confidentiality of complainants' identities must be protected as provided in § 26.109(b).

(2) You must review your records concerning the firm, any material provided by the firm and the complainant, and other available information. You may request additional information from the firm or conduct any other investigation that you deem necessary.

(3) If you determine, based on this review, that there is reasonable cause to believe that the firm is ineligible, you must provide written notice to the firm that you propose to find the firm ineligible, setting forth the reasons for the proposed determination. If you determine that such reasonable cause does not exist, you must notify the complainant and the firm in writing of this determination and the reasons for it. All statements of reasons for findings

## 49 CFR Subtitle A (10-1-10 Edition)

on the issue of reasonable cause must specifically reference the evidence in the record on which each reason is based.

(b) *Recipient-initiated proceedings.* If, based on notification by the firm of a change in its circumstances or other information that comes to your attention, you determine that there is reasonable cause to believe that a currently certified firm is ineligible, you must provide written notice to the firm that you propose to find the firm ineligible, setting forth the reasons for the proposed determination. The statement of reasons for the finding of reasonable cause must specifically reference the evidence in the record on which each reason is based.

(c) *DOT directive to initiate proceeding.*

(1) If the concerned operating administration determines that information in your certification records, or other information available to the concerned operating administration, provides reasonable cause to believe that a firm you certified does not meet the eligibility criteria of this part, the concerned operating administration may direct you to initiate a proceeding to remove the firm's certification.

(2) The concerned operating administration must provide you and the firm a notice setting forth the reasons for the directive, including any relevant documentation or other information.

(3) You must immediately commence and prosecute a proceeding to remove eligibility as provided by paragraph (b) of this section.

(d) *Hearing.* When you notify a firm that there is reasonable cause to remove its eligibility, as provided in paragraph (a), (b), or (c) of this section, you must give the firm an opportunity for an informal hearing, at which the firm may respond to the reasons for the proposal to remove its eligibility in person and provide information and arguments concerning why it should remain certified.

(1) In such a proceeding, you bear the burden of proving, by a preponderance of the evidence, that the firm does not meet the certification standards of this part.

(2) You must maintain a complete record of the hearing, by any means acceptable under state law for the retention of a verbatim record of an administrative hearing. If there is an appeal to DOT under § 26.89, you must provide a transcript of the hearing to DOT and, on request, to the firm. You must retain the original record of the hearing. You may charge the firm only for the cost of copying the record.

(3) The firm may elect to present information and arguments in writing, without going to a hearing. In such a situation, you bear the same burden of proving, by a preponderance of the evidence, that the firm does not meet the certification standards, as you would during a hearing.

(e) *Separation of functions.* You must ensure that the decision in a proceeding to remove a firm's eligibility is made by an office and personnel that did not take part in actions leading to or seeking to implement the proposal to remove the firm's eligibility and are not subject, with respect to the matter, to direction from the office or personnel who did take part in these actions.

(1) Your method of implementing this requirement must be made part of your DBE program.

(2) The decisionmaker must be an individual who is knowledgeable about the certification requirements of your DBE program and this part.

(3) Before a UCP is operational in its state, a small airport or small transit authority (i.e., an airport or transit authority serving an area with less than 250,000 population) is required to meet this requirement only to the extent feasible.

(f) *Grounds for decision.* You must not base a decision to remove eligibility on a reinterpretation or changed opinion of information available to the recipient at the time of its certification of the firm. You may base such a decision only on one or more of the following:

(1) Changes in the firm's circumstances since the certification of the firm by the recipient that render the firm unable to meet the eligibility standards of this part;

(2) Information or evidence not available to you at the time the firm was certified;

(3) Information that was concealed or misrepresented by the firm in previous certification actions by a recipient;

(4) A change in the certification standards or requirements of the Department since you certified the firm; or

(5) A documented finding that your determination to certify the firm was factually erroneous.

(g) *Notice of decision.* Following your decision, you must provide the firm written notice of the decision and the reasons for it, including specific references to the evidence in the record that supports each reason for the decision. The notice must inform the firm of the consequences of your decision and of the availability of an appeal to the Department of Transportation under § 26.89. You must send copies of the notice to the complainant in an ineligibility complaint or the concerned operating administration that had directed you to initiate the proceeding.

(h) When you decertify a DBE firm certified by the SBA, you must notify the SBA in writing. The notification must include the reason for denial.

(i) *Status of firm during proceeding.* (1) A firm remains an eligible DBE during the pendency of your proceeding to remove its eligibility.

(2) The firm does not become ineligible until the issuance of the notice provided for in paragraph (g) of this section.

(j) *Effects of removal of eligibility.* When you remove a firm's eligibility, you must take the following action:

(1) When a prime contractor has made a commitment to using the ineligible firm, or you have made a commitment to using a DBE prime contractor, but a subcontract or contract has not been executed before you issue the decertification notice provided for in paragraph (g) of this section, the ineligible firm does not count toward the contract goal or overall goal. You must direct the prime contractor to meet the contract goal with an eligible DBE firm or demonstrate to you that it has made a good faith effort to do so.

(2) If a prime contractor has executed a subcontract with the firm before you have notified the firm of its ineligibility, the prime contractor may continue to use the firm on the contract

## § 26.89

and may continue to receive credit toward its DBE goal for the firm's work. In this case, or in a case where you have let a prime contract to the DBE that was later ruled ineligible, the portion of the ineligible firm's performance of the contract remaining after you issued the notice of its ineligibility shall not count toward your overall goal, but may count toward the contract goal.

(3) *Exception:* If the DBE's ineligibility is caused solely by its having exceeded the size standard during the performance of the contract, you may continue to count its participation on that contract toward overall and contract goals.

(k) *Availability of appeal.* When you make an administratively final removal of a firm's eligibility under this section, the firm may appeal the removal to the Department under § 26.89.

[64 FR 5126, Feb. 2, 1999, as amended at 68 FR 35556, June 16, 2003]

### § 26.89 What is the process for certification appeals to the Department of Transportation?

(a)(1) If you are a firm that is denied certification or whose eligibility is removed by a recipient, including SBA-certified firms applying pursuant to the DOT/SBA MOU, you may make an administrative appeal to the Department.

(2) If you are a complainant in an ineligibility complaint to a recipient (including the concerned operating administration in the circumstances provided in § 26.87(c)), you may appeal to the Department if the recipient does not find reasonable cause to propose removing the firm's eligibility or, following a removal of eligibility proceeding, determines that the firm is eligible.

(3) Send appeals to the following address: Department of Transportation, Office of Civil Rights, 1200 New Jersey Avenue, SE., Washington, DC 20590.

(b) Pending the Department's decision in the matter, the recipient's decision remains in effect. The Department does not stay the effect of the recipient's decision while it is considering an appeal.

(c) If you want to file an appeal, you must send a letter to the Department

## 49 CFR Subtitle A (10-1-10 Edition)

within 90 days of the date of the recipient's final decision, including information and arguments concerning why the recipient's decision should be reversed. The Department may accept an appeal filed later than 90 days after the date of the decision if the Department determines that there was good cause for the late filing of the appeal.

(1) If you are an appellant who is a firm which has been denied certification, whose certification has been removed, whose owner is determined not to be a member of a designated disadvantaged group, or concerning whose owner the presumption of disadvantage has been rebutted, your letter must state the name and address of any other recipient which currently certifies the firm, which has rejected an application for certification from the firm or removed the firm's eligibility within one year prior to the date of the appeal, or before which an application for certification or a removal of eligibility is pending. Failure to provide this information may be deemed a failure to cooperate under § 26.109(c).

(2) If you are an appellant other than one described in paragraph (c)(1) of this section, the Department will request, and the firm whose certification has been questioned shall promptly provide, the information called for in paragraph (c)(1) of this section. Failure to provide this information may be deemed a failure to cooperate under § 26.109(c).

(d) When it receives an appeal, the Department requests a copy of the recipient's complete administrative record in the matter. If you are the recipient, you must provide the administrative record, including a hearing transcript, within 20 days of the Department's request. The Department may extend this time period on the basis of a recipient's showing of good cause. To facilitate the Department's review of a recipient's decision, you must ensure that such administrative records are well organized, indexed, and paginated. Records that do not comport with these requirements are not acceptable and will be returned to you to be corrected immediately. If an

appeal is brought concerning one recipient's certification decision concerning a firm, and that recipient relied on the decision and/or administrative record of another recipient, this requirement applies to both recipients involved.

(e) The Department makes its decision based solely on the entire administrative record. The Department does not make a de novo review of the matter and does not conduct a hearing. The Department may supplement the administrative record by adding relevant information made available by the DOT Office of Inspector General; Federal, state, or local law enforcement authorities; officials of a DOT operating administration or other appropriate DOT office; a recipient; or a firm or other private party.

(f) As a recipient, when you provide supplementary information to the Department, you shall also make this information available to the firm and any third-party complainant involved, consistent with Federal or applicable state laws concerning freedom of information and privacy. The Department makes available, on request by the firm and any third-party complainant involved, any supplementary information it receives from any source.

(1) The Department affirms your decision unless it determines, based on the entire administrative record, that your decision is unsupported by substantial evidence or inconsistent with the substantive or procedural provisions of this part concerning certification.

(2) If the Department determines, after reviewing the entire administrative record, that your decision was unsupported by substantial evidence or inconsistent with the substantive or procedural provisions of this part concerning certification, the Department reverses your decision and directs you to certify the firm or remove its eligibility, as appropriate. You must take the action directed by the Department's decision immediately upon receiving written notice of it.

(3) The Department is not required to reverse your decision if the Department determines that a procedural error did not result in fundamental unfairness to the appellant or substan-

tially prejudice the opportunity of the appellant to present its case.

(4) If it appears that the record is incomplete or unclear with respect to matters likely to have a significant impact on the outcome of the case, the Department may remand the record to you with instructions seeking clarification or augmentation of the record before making a finding. The Department may also remand a case to you for further proceedings consistent with Department instructions concerning the proper application of the provisions of this part.

(5) The Department does not uphold your decision based on grounds not specified in your decision.

(6) The Department's decision is based on the status and circumstances of the firm as of the date of the decision being appealed.

(7) The Department provides written notice of its decision to you, the firm, and the complainant in an ineligibility complaint. A copy of the notice is also sent to any other recipient whose administrative record or decision has been involved in the proceeding (see paragraph (d) of this section). The Department will also notify the SBA in writing when DOT takes an action on an appeal that results in or confirms a loss of eligibility to any SBA-certified firm. The notice includes the reasons for the Department's decision, including specific references to the evidence in the record that supports each reason for the decision.

(8) The Department's policy is to make its decision within 180 days of receiving the complete administrative record. If the Department does not make its decision within this period, the Department provides written notice to concerned parties, including a statement of the reason for the delay and a date by which the appeal decision will be made.

(g) All decisions under this section are administratively final, and are not subject to petitions for reconsideration.

[64 FR 5126, Feb. 2, 1999, as amended at 65 FR 68951, Nov. 15, 2000; 68 FR 35556, June 16, 2003; 73 FR 33329, June 12, 2008]

## **§ 26.91**

### **§ 26.91 What actions do recipients take following DOT certification appeal decisions?**

(a) If you are the recipient from whose action an appeal under § 26.89 is taken, the decision is binding. It is not binding on other recipients.

(b) If you are a recipient to which a DOT determination under § 26.89 is applicable, you must take the following action:

(1) If the Department determines that you erroneously certified a firm, you must remove the firm's eligibility on receipt of the determination, without further proceedings on your part. Effective on the date of your receipt of the Department's determination, the consequences of a removal of eligibility set forth in § 26.87(i) take effect.

(2) If the Department determines that you erroneously failed to find reasonable cause to remove the firm's eligibility, you must expeditiously commence a proceeding to determine whether the firm's eligibility should be removed, as provided in § 26.87.

(3) If the Department determines that you erroneously declined to certify or removed the eligibility of the firm, you must certify the firm, effective on the date of your receipt of the written notice of Department's determination.

(4) If the Department determines that you erroneously determined that the presumption of social and economic disadvantage either should or should not be deemed rebutted, you must take appropriate corrective action as determined by the Department.

(5) If the Department affirms your determination, no further action is necessary.

(c) Where DOT has upheld your denial of certification to or removal of eligibility from a firm, or directed the removal of a firm's eligibility, other recipients with whom the firm is certified may commence a proceeding to remove the firm's eligibility under § 26.87. Such recipients must not remove the firm's eligibility absent such a proceeding. Where DOT has reversed your denial of certification to or removal of eligibility from a firm, other recipients must take the DOT action into account in any certification action involving the firm. However, other

## **49 CFR Subtitle A (10-1-10 Edition)**

recipients are not required to certify the firm based on the DOT decision.

### **Subpart F—Compliance and Enforcement**

#### **§ 26.101 What compliance procedures apply to recipients?**

(a) If you fail to comply with any requirement of this part, you may be subject to formal enforcement action under § 26.103 or § 26.105 or appropriate program sanctions by the concerned operating administration, such as the suspension or termination of Federal funds, or refusal to approve projects, grants or contracts until deficiencies are remedied. Program sanctions may include, in the case of the FHWA program, actions provided for under 23 CFR 1.36; in the case of the FAA program, actions consistent with 49 U.S.C. 47106(d), 47111(d), and 47122; and in the case of the FTA program, any actions permitted under 49 U.S.C. chapter 53 or applicable FTA program requirements.

(b) As provided in statute, you will not be subject to compliance actions or sanctions for failing to carry out any requirement of this part because you have been prevented from complying because a Federal court has issued a final order in which the court found that the requirement is unconstitutional.

#### **§ 26.103 What enforcement actions apply in FHWA and FTA programs?**

The provisions of this section apply to enforcement actions under FHWA and FTA programs:

(a) *Noncompliance complaints.* Any person who believes that a recipient has failed to comply with its obligations under this part may file a written complaint with the concerned operating administration's Office of Civil Rights. If you want to file a complaint, you must do so no later than 180 days after the date of the alleged violation or the date on which you learned of a continuing course of conduct in violation of this part. In response to your written request, the Office of Civil Rights may extend the time for filing in the interest of justice, specifying in writing the reason for so doing. The Office of Civil Rights may protect the

confidentiality of your identity as provided in § 26.109(b). Complaints under this part are limited to allegations of violation of the provisions of this part.

(b) *Compliance reviews.* The concerned operating administration may review the recipient's compliance with this part at any time, including reviews of paperwork and on-site reviews, as appropriate. The Office of Civil Rights may direct the operating administration to initiate a compliance review based on complaints received.

(c) *Reasonable cause notice.* If it appears, from the investigation of a complaint or the results of a compliance review, that you, as a recipient, are in noncompliance with this part, the appropriate DOT office promptly sends you, return receipt requested, a written notice advising you that there is reasonable cause to find you in noncompliance. The notice states the reasons for this finding and directs you to reply within 30 days concerning whether you wish to begin conciliation.

(d) *Conciliation.* (1) If you request conciliation, the appropriate DOT office shall pursue conciliation for at least 30, but not more than 120, days from the date of your request. The appropriate DOT office may extend the conciliation period for up to 30 days for good cause, consistent with applicable statutes.

(2) If you and the appropriate DOT office sign a conciliation agreement, then the matter is regarded as closed and you are regarded as being in compliance. The conciliation agreement sets forth the measures you have taken or will take to ensure compliance. While a conciliation agreement is in effect, you remain eligible for FHWA or FTA financial assistance.

(3) The concerned operating administration shall monitor your implementation of the conciliation agreement and ensure that its terms are complied with. If you fail to carry out the terms of a conciliation agreement, you are in noncompliance.

(4) If you do not request conciliation, or a conciliation agreement is not signed within the time provided in paragraph (d)(1) of this section, then enforcement proceedings begin.

(e) *Enforcement actions.* (1) Enforcement actions are taken as provided in this subpart.

(2) Applicable findings in enforcement proceedings are binding on all DOT offices.

#### **§ 26.105 What enforcement actions apply in FAA programs?**

(a) Compliance with all requirements of this part by airport sponsors and other recipients of FAA financial assistance is enforced through the procedures of Title 49 of the United States Code, including 49 U.S.C. 47106(d), 47111(d), and 47122, and regulations implementing them.

(b) The provisions of § 26.103(b) and this section apply to enforcement actions in FAA programs.

(c) Any person who knows of a violation of this part by a recipient of FAA funds may file a complaint under 14 CFR part 16 with the Federal Aviation Administration Office of Chief Counsel.

#### **§ 26.107 What enforcement actions apply to firms participating in the DBE program?**

(a) If you are a firm that does not meet the eligibility criteria of subpart D of this part and that attempts to participate in a DOT-assisted program as a DBE on the basis of false, fraudulent, or deceitful statements or representations or under circumstances indicating a serious lack of business integrity or honesty, the Department may initiate suspension or debarment proceedings against you under 49 CFR part 29.

(b) If you are a firm that, in order to meet DBE contract goals or other DBE program requirements, uses or attempts to use, on the basis of false, fraudulent or deceitful statements or representations or under circumstances indicating a serious lack of business integrity or honesty, another firm that does not meet the eligibility criteria of subpart D of this part, the Department may initiate suspension or debarment proceedings against you under 49 CFR part 29.

(c) In a suspension or debarment proceeding brought under paragraph (a) or (b) of this section, the concerned operating administration may consider the fact that a purported DBE has been

## § 26.109

certified by a recipient. Such certification does not preclude the Department from determining that the purported DBE, or another firm that has used or attempted to use it to meet DBE goals, should be suspended or debarred.

(d) The Department may take enforcement action under 49 CFR Part 31, Program Fraud and Civil Remedies, against any participant in the DBE program whose conduct is subject to such action under 49 CFR part 31.

(e) The Department may refer to the Department of Justice, for prosecution under 18 U.S.C. 1001 or other applicable provisions of law, any person who makes a false or fraudulent statement in connection with participation of a DBE in any DOT-assisted program or otherwise violates applicable Federal statutes.

### **§ 26.109 What are the rules governing information, confidentiality, cooperation, and intimidation or retaliation?**

(a) *Availability of records.* (1) In responding to requests for information concerning any aspect of the DBE program, the Department complies with provisions of the Federal Freedom of Information and Privacy Acts (5 U.S.C. 552 and 552a). The Department may make available to the public any information concerning the DBE program release of which is not prohibited by Federal law.

(2) Notwithstanding any provision of Federal or state law, you must not release information that may be reasonably be construed as confidential business information to any third party without the written consent of the firm that submitted the information. This includes applications for DBE certification and supporting documentation. However, you must transmit this information to DOT in any certification appeal proceeding under § 26.89 in which the disadvantaged status of the individual is in question.

(b) *Confidentiality of information on complainants.* Notwithstanding the provisions of paragraph (a) of this section, the identity of complainants shall be kept confidential, at their election. If such confidentiality will hinder the investigation, proceeding or hearing, or

## 49 CFR Subtitle A (10-1-10 Edition)

result in a denial of appropriate administrative due process to other parties, the complainant must be advised for the purpose of waiving the privilege. Complainants are advised that, in some circumstances, failure to waive the privilege may result in the closure of the investigation or dismissal of the proceeding or hearing. FAA follows the procedures of 14 CFR part 16 with respect to confidentiality of information in complaints.

(c) *Cooperation.* All participants in the Department's DBE program (including, but not limited to, recipients, DBE firms and applicants for DBE certification, complainants and appellants, and contractors using DBE firms to meet contract goals) are required to cooperate fully and promptly with DOT and recipient compliance reviews, certification reviews, investigations, and other requests for information. Failure to do so shall be a ground for appropriate action against the party involved (e.g., with respect to recipients, a finding of noncompliance; with respect to DBE firms, denial of certification or removal of eligibility and/or suspension and debarment; with respect to a complainant or appellant, dismissal of the complaint or appeal; with respect to a contractor which uses DBE firms to meet goals, findings of non-responsibility for future contracts and/or suspension and debarment).

(d) *Intimidation and retaliation.* If you are a recipient, contractor, or any other participant in the program, you must not intimidate, threaten, coerce, or discriminate against any individual or firm for the purpose of interfering with any right or privilege secured by this part or because the individual or firm has made a complaint, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this part. If you violate this prohibition, you are in noncompliance with this part.

[64 FR 5126, Feb. 2, 1999, as amended at 68 FR 35556, June 16, 2003]

### **APPENDIX A TO PART 26—GUIDANCE CONCERNING GOOD FAITH EFFORTS**

1. When, as a recipient, you establish a contract goal on a DOT-assisted contract, a bidder must, in order to be responsible and/or responsive, make good faith efforts to

meet the goal. The bidder can meet this requirement in either of two ways. First, the bidder can meet the goal, documenting commitments for participation by DBE firms sufficient for this purpose. Second, even if it doesn't meet the goal, the bidder can document adequate good faith efforts. This means that the bidder must show that it took all necessary and reasonable steps to achieve a DBE goal or other requirement of this part which, by their scope, intensity, and appropriateness to the objective, could reasonably be expected to obtain sufficient DBE participation, even if they were not fully successful.

II. In any situation in which you have established a contract goal, part 26 requires you to use the good faith efforts mechanism of this part. As a recipient, it is up to you to make a fair and reasonable judgment whether a bidder that did not meet the goal made adequate good faith efforts. It is important for you to consider the quality, quantity, and intensity of the different kinds of efforts that the bidder has made. The efforts employed by the bidder should be those that one could reasonably expect a bidder to take if the bidder were actively and aggressively trying to obtain DBE participation sufficient to meet the DBE contract goal. Mere *pro forma* efforts are not good faith efforts to meet the DBE contract requirements. We emphasize, however, that your determination concerning the sufficiency of the firm's good faith efforts is a judgment call: meeting quantitative formulas is not required.

III. The Department also strongly cautions you against requiring that a bidder meet a contract goal (i.e., obtain a specified amount of DBE participation) in order to be awarded a contract, even though the bidder makes an adequate good faith efforts showing. This rule specifically prohibits you from ignoring *bona fide* good faith efforts.

IV. The following is a list of types of actions which you should consider as part of the bidder's good faith efforts to obtain DBE participation. It is not intended to be a mandatory checklist, nor is it intended to be exclusive or exhaustive. Other factors or types of efforts may be relevant in appropriate cases.

A. Soliciting through all reasonable and available means (e.g. attendance at pre-bid meetings, advertising and/or written notices) the interest of all certified DBEs who have the capability to perform the work of the contract. The bidder must solicit this interest within sufficient time to allow the DBEs to respond to the solicitation. The bidder must determine with certainty if the DBEs are interested by taking appropriate steps to follow up initial solicitations.

B. Selecting portions of the work to be performed by DBEs in order to increase the likelihood that the DBE goals will be achieved. This includes, where appropriate,

breaking out contract work items into economically feasible units to facilitate DBE participation, even when the prime contractor might otherwise prefer to perform these work items with its own forces.

C. Providing interested DBEs with adequate information about the plans, specifications, and requirements of the contract in a timely manner to assist them in responding to a solicitation.

D. (1) Negotiating in good faith with interested DBEs. It is the bidder's responsibility to make a portion of the work available to DBE subcontractors and suppliers and to select those portions of the work or material needs consistent with the available DBE subcontractors and suppliers, so as to facilitate DBE participation. Evidence of such negotiation includes the names, addresses, and telephone numbers of DBEs that were considered; a description of the information provided regarding the plans and specifications for the work selected for subcontracting; and evidence as to why additional agreements could not be reached for DBEs to perform the work.

(2) A bidder using good business judgment would consider a number of factors in negotiating with subcontractors, including DBE subcontractors, and would take a firm's price and capabilities as well as contract goals into consideration. However, the fact that there may be some additional costs involved in finding and using DBEs is not in itself sufficient reason for a bidder's failure to meet the contract DBE goal, as long as such costs are reasonable. Also, the ability or desire of a prime contractor to perform the work of a contract with its own organization does not relieve the bidder of the responsibility to make good faith efforts. Prime contractors are not, however, required to accept higher quotes from DBEs if the price difference is excessive or unreasonable.

E. Not rejecting DBEs as being unqualified without sound reasons based on a thorough investigation of their capabilities. The contractor's standing within its industry, membership in specific groups, organizations, or associations and political or social affiliations (for example union vs. non-union employee status) are not legitimate causes for the rejection or non-solicitation of bids in the contractor's efforts to meet the project goal.

F. Making efforts to assist interested DBEs in obtaining bonding, lines of credit, or insurance as required by the recipient or contractor.

G. Making efforts to assist interested DBEs in obtaining necessary equipment, supplies, materials, or related assistance or services.

H. Effectively using the services of available minority/women community organizations; minority/women contractors' groups; local, state, and Federal minority/women

**Pt. 26, App. A**

business assistance offices; and other organizations as allowed on a case-by-case basis to provide assistance in the recruitment and placement of DBEs.

V. In determining whether a bidder has made good faith efforts, you may take into account the performance of other bidders in meeting the contract. For example, when the apparent successful bidder fails to meet the contract goal, but others meet it, you may

**49 CFR Subtitle A (10-1-10 Edition)**

reasonably raise the question of whether, with additional reasonable efforts, the apparent successful bidder could have met the goal. If the apparent successful bidder fails to meet the goal, but meets or exceeds the average DBE participation obtained by other bidders, you may view this, in conjunction with other factors, as evidence of the apparent successful bidder having made good faith efforts.

## APPENDIX B TO PART 26—UNIFORM REPORT OF DBE AWARDS OR COMMITMENTS AND PAYMENTS FORM

## INSTRUCTIONS FOR COMPLETING THE UNIFORM REPORT OF DBE AWARDS OR COMMITMENTS AND PAYMENTS

1. Indicate the DOT Operating Administration (OA) that provides your Federal financial assistance. If assistance comes from more than one OA, use separate reporting forms for each OA. If you are an FTA recipient, indicate your Vendor Number in the space provided.
2. If you are an FAA recipient, indicate the relevant AIP Numbers covered by this report. If more than six, attach a separate sheet.
3. Specify the Federal fiscal year (i.e., October 1 – September 30) in which the covered reporting period falls.
4. State the date of submission of this report.
5. Check the appropriate box that indicates the reporting period that the data provided in this report covers. If this report is due June 1, data should cover October 1 – March 31. If this report is due December 1, data should cover April 1 – September 30. If this report is due to the FAA, data should cover the entire year.
6. Name of the recipient.
7. State your annual DBE goal(s) established for the Federal fiscal year of this report to be submitted to and approved by the relevant OA. Your Overall Goal is to be reported as well as the breakdown for specific Race Conscious and Race Neutral Goals (both of which include gender-conscious/neutral goals). The Race Conscious Goal portion should be based on programs that focus on and provide benefits only for DBEs. The use of contract goals is a primary example of a Race Conscious measure. The Race Neutral Goal portion should include programs that, while benefiting DBEs, are not solely focused on DBE firms. For example, a small business outreach program, technical assistance, and prompt payment clauses can assist a wide variety of businesses in addition to helping DBE firms.
- 8-9. The amounts in items 8(A)-9(I) should include all types of prime contracts awarded and all types of subcontracts awarded or committed, including professional or consultant services, construction, purchase of materials or supplies, lease or purchase of equipment and any other types of services. All dollar amounts are to reflect only the Federal share of such contracts, and should be rounded to the nearest dollar.
- 8(A). Provide the total dollar amount for all prime contracts assisted with DOT funds that were awarded during this reporting period.
- 8(B). Provide the total number of all prime contracts assisted with DOT funds that were awarded during this reporting period.
- 8(C). From the total dollar amount awarded in item 8(A), provide the dollar amount awarded to certified DBEs during this reporting period.
- 8(D). From the total number of prime contracts awarded in item 8(B), specify the number awarded to certified DBEs during this reporting period.
- 8(E). From the total dollars awarded in 8(C), provide the dollar amount awarded to DBEs through the use of Race Conscious methods. See the definition of Race Conscious Goal in item 7 and the explanation of project types in item 8 to include in your calculation.
- 8(F). From the total number of prime contracts awarded in 8(D), specify the number awarded to DBEs through Race Conscious methods.
- 8(G). From the total dollar amount awarded in item 8(C), provide the dollar amount awarded to certified DBEs through the use of Race Neutral methods. See the definition of Race Neutral Goal in item 7 and the explanation of project types in item 8 to include.
- 8(H). From the total number of prime contracts awarded in 8(D), specify the number awarded to DBEs through Race Neutral methods.
- 8(I). Of all prime contracts awarded this reporting period, calculate the percentage going to DBEs. Divide the dollar amount in item 8(C) by the dollar amount in item 8(A) to derive this percentage. Round percentage to the nearest tenth.
- 9(A)-9(I). Items 9(A)-9(I) are derived in the same way as items 8(A)-8(I), except that these calculations should be based on subcontracts rather than prime contracts. Unlike prime contracts, which may only be awarded, subcontracts may be either awarded or committed.
- 10(A)-11(I). For all DBEs awarded prime contracts and awarded or committed subcontracts as indicated in 8(C) (D) and 9(C)-(D), break the data down further by total dollar amount as well as the number of all contracts going to each ethnic group as well as to non-minority women. The "Other" category includes those DBEs who are not members of the presumptively disadvantaged groups already listed, but who are determined eligible for the DBE program on an individual basis (e.g., a Caucasian male with a disability). The TOTALS value in 10(H) should equal the sum of 8(C) plus 9(C), and similarly, the TOTALS value in 11(I) should equal the sum of 8(D) plus 9(D). Column I should only be filled out if this report is due on December 1, as indicated in item 5. The values for this column are derived by adding the values reported in column H in your first report with the values reported in this second report.
- 12(A). Provide the total number of prime contracts completed during this reporting period that had Race Conscious goals. Race Conscious contracts are those with contract goals or another Race Conscious measure.
- 12(B). Provide the total dollar value of prime contracts completed this reporting period that had Race Conscious goals.
- 12(C). Provide the total dollar amount of DBE participation on all Race Conscious prime contracts completed this reporting period that was necessary to meet the contract goals on them. This applies only to Race Conscious prime contracts.
- 12(D). Provide the actual total DBE participation in dollars on the race conscious prime contracts completed this reporting period.
- 12(E). Of all the prime contracts completed this reporting period, calculate the percentage of DBE participation. Divide the actual total dollar amount in 12(D) by the total dollar value provided in 12(B) to derive this percentage. Round to the nearest tenth.
- 13(A)-13(E). Items 13(A)-13(E) are derived in the same manner as items 12(A)-12(E), except these figures should be based on Race Neutral prime contracts (i.e. those with no race conscious measures).
- 14(A)-14(E). Calculate the totals for each column by adding the race conscious and neutral figures provided in each row above.
15. Name of the Authorized Representative preparing this form.
16. Signature of the Authorized Representative.
17. Phone number of the Authorized Representative.
18. Fax number of the Authorized Representative.

**\*\*Submit your completed report to your Regional or Division Office.**

[64 FR 5126, Feb. 2, 1999, as amended at 68 FR 35556, June 16, 2003]

program, via the provision of training and assistance from the recipient.

(A) Each firm that participates in a recipient's business development program (BDP) program is subject to a program term determined by the recipient. The term should consist of two stages; a developmental stage and a transitional stage.

(B) In order for a firm to remain eligible for program participation, it must continue to meet all eligibility criteria contained in part 26.

(C) By no later than 6 months of program entry, the participant should develop and submit to the recipient a comprehensive business plan setting forth the participant's business targets, objectives and goals. The participant will not be eligible for program benefits until such business plan is submitted and approved by the recipient. The approved business plan will constitute the participant's short and long term goals and the strategy for developmental growth to the point of economic viability in non-traditional areas of work and/or work outside the DBE program.

(D) The business plan should contain at least the following:

(1) An analysis of market potential, competitive environment and other business analyses estimating the program participant's prospects for profitable operation during the term of program participation and after graduation from the program.

(2) An analysis of the firm's strengths and weaknesses, with particular attention paid to the means of correcting any financial, managerial, technical, or labor conditions which could impede the participant from receiving contracts other than those in traditional areas of DBE participation.

(3) Specific targets, objectives, and goals for the business development of the participant during the next two years, utilizing the results of the analysis conducted pursuant to paragraphs (C) and (D)(1) of this appendix;

(4) Estimates of contract awards from the DBE program and from other sources which are needed to meet the objectives and goals for the years covered by the business plan; and

(5) Such other information as the recipient may require.

(E) Each participant should annually review its currently approved business plan with the recipient and modify the plan as may be appropriate to account for any changes in the firm's structure and redefined needs. The currently approved plan should be considered the applicable plan for all program purposes until the recipient approves in writing a modified plan. The recipient should establish an anniversary date for review of the participant's business plan and contract forecasts.

(F) Each participant should annually forecast in writing its need for contract awards for the next program year and the succeeding program year during the review of its business plan conducted under paragraph (E) of this appendix. Such forecast should be included in the participant's business plan. The forecast should include:

(1) The aggregate dollar value of contracts to be sought under the DBE program, reflecting compliance with the business plan;

(2) The aggregate dollar value of contracts to be sought in areas other than traditional areas of DBE participation;

(3) The types of contract opportunities being sought, based on the firm's primary line of business; and

(4) Such other information as may be requested by the recipient to aid in providing effective business development assistance to the participant.

(G) Program participation is divided into two stages; (1) a developmental stage and (2) a transitional stage. The developmental stage is designed to assist participants to overcome their social and economic disadvantage by providing such assistance as may be necessary and appropriate to enable them to access relevant markets and strengthen their financial and managerial skills. The transitional stage of program participation follows the developmental stage and is designed to assist participants to overcome, insofar as practical, their social and economic disadvantage and to prepare the participant for leaving the program.

(H) The length of service in the program term should not be a pre-set time frame for either the developmental or transitional stages but should be figured on the number of years considered necessary in normal progression of achieving the firm's established goals and objectives. The setting of such time could be factored on such items as, but not limited to, the number of contracts, aggregate amount of the contract received, years in business, growth potential, etc.

(I) Beginning in the first year of the transitional stage of program participation, each participant should annually submit for inclusion in its business plan a transition management plan outlining specific steps to promote profitable business operations in areas other than traditional areas of DBE participation after graduation from the program. The transition management plan should be submitted to the recipient at the same time other modifications are submitted pursuant to the annual review under paragraph (E) of this section. The plan should set forth the same information as required under paragraph (F) of steps the participant will take to continue its business development after the expiration of its program term.

(J) When a participant is recognized as successfully completing the program by substantially achieving the targets, objectives and goals set forth in its program term, and has demonstrated the ability to compete in the marketplace, its further participation within the program may be determined by the recipient.

(K) In determining whether a concern has substantially achieved the goals and objectives of its business plan, the following factors, among others, should be considered by the recipient:

- (1) Profitability;
- (2) Sales, including improved ratio of non-traditional contracts to traditional-type contracts;
- (3) Net worth, financial ratios, working capital, capitalization, access to credit and capital;
- (4) Ability to obtain bonding;
- (5) A positive comparison of the DBE's business and financial profile with profiles of non-DBE businesses in the same area or similar business category; and
- (6) Good management capacity and capability.

(L) Upon determination by the recipient that the participant should be graduated from the developmental program, the recipient should notify the participant in writing of its intent to graduate the firm in a letter of notification. The letter of notification should set forth findings, based on the facts, for every material issue relating to the basis of the program graduation with specific reasons for each finding. The letter of notification should also provide the participant 45 days from the date of service of the letter to submit in writing information that would explain why the proposed basis of graduation is not warranted.

(M) Participation of a DBE firm in the program may be discontinued by the recipient prior to expiration of the firm's program term for good cause due to the failure of the firm to engage in business practices that will promote its competitiveness within a reasonable period of time as evidenced by, among other indicators, a pattern of inadequate performance or unjustified delinquent performance. Also, the recipient can discontinue the participation of a firm that does not actively pursue and bid on contracts, and a firm that, without justification, regularly fails to respond to solicitations in the type of work it is qualified for and in the geographical areas where it has indicated availability under its approved business plan. The recipient should take such action if over a 2-year period a DBE firm exhibits such a pattern.

#### APPENDIX D TO PART 26—MENTOR-PROTÉGÉ PROGRAM GUIDELINES

(A) The purpose of this program element is to further the development of DBEs, including but not limited to assisting them to move into non-traditional areas of work and/or compete in the marketplace outside the DBE program, via the provision of training and assistance from other firms. To operate a mentor-protégé program, a recipient must obtain the approval of the concerned operating administration.

(B)(1) Any mentor-protégé relationship shall be based on a written development plan, approved by the recipient, which clearly sets forth the objectives of the parties and their respective roles, the duration of the arrangement and the services and resources to be provided by the mentor to the protégé. The formal mentor-protégé agreement may set a fee schedule to cover the direct and indirect cost for such services rendered by the mentor for specific training and assistance to the protégé through the life of the agreement. Services provided by the mentor may be reimbursable under the FTA, FHWA, and FAA programs.

(2) To be eligible for reimbursement, the mentor's services provided and associated costs must be directly attributable and properly allowable to specific individual contracts. The recipient may establish a line item for the mentor to quote the portion of the fee schedule expected to be provided during the life of the contract. The amount claimed shall be verified by the recipient and paid on an incremental basis representing the time the protégé is working on the contract. The total individual contract figures accumulated over the life of the agreement shall not exceed the amount stipulated in the original mentor/protégé agreement.

(C) DBEs involved in a mentor-protégé agreement must be independent business entities which meet the requirements for certification as defined in subpart D of this part. A protégé firm must be certified *before* it begins participation in a mentor-protégé arrangement. If the recipient chooses to recognize mentor/protégé agreements, it should establish formal general program guidelines. These guidelines must be submitted to the operating administration for approval prior to the recipient executing an individual contractor/ subcontractor mentor-protégé agreement.

#### APPENDIX E TO PART 26—INDIVIDUAL DETERMINATIONS OF SOCIAL AND ECONOMIC DISADVANTAGE

The following guidance is adapted, with minor modifications, from SBA regulations concerning social and economic disadvantage determinations (see 13 CFR 124.103(c) and 124.104).

##### SOCIAL DISADVANTAGE

I. Socially disadvantaged individuals are those who have been subjected to racial or ethnic prejudice or cultural bias within American society because of their identities as members of groups and without regard to their individual qualities. Social disadvantage must stem from circumstances beyond their control. Evidence of individual social disadvantage must include the following elements:

(A) At least one objective distinguishing feature that has contributed to social disadvantage, such as race, ethnic origin, gender, disability, long-term residence in an environment isolated from the mainstream of American society, or other similar causes not common to individuals who are not socially disadvantaged;

(B) Personal experiences of substantial and chronic social disadvantage in American society, not in other countries; and

(C) Negative impact on entry into or advancement in the business world because of the disadvantage. Recipients will consider any relevant evidence in assessing this element. In every case, however, recipients will consider education, employment and business history, where applicable, to see if the totality of circumstances shows disadvantage in entering into or advancing in the business world.

(1) *Education.* Recipients will consider such factors as denial of equal access to institutions of higher education and vocational training, exclusion from social and professional association with students or teachers, denial of educational honors rightfully earned, and social patterns or pressures which discouraged the individual from pursuing a professional or business education.

(2) *Employment.* Recipients will consider such factors as unequal treatment in hiring, promotions and other aspects of professional advancement, pay and fringe benefits, and other terms and conditions of employment; retaliatory or discriminatory behavior by an employer or labor union; and social patterns or pressures which have channeled the individual into non-professional or non-business fields.

(3) *Business history.* The recipient will consider such factors as unequal access to credit or capital, acquisition of credit or capital under commercially unfavorable circumstances, unequal treatment in opportunities for government contracts or other work, unequal treatment by potential customers and business associates, and exclusion from business or professional organizations.

II. With respect to paragraph I.(A) of this appendix, the Department notes that people with disabilities have disproportionately low incomes and high rates of unemployment. Many physical and attitudinal barriers remain to their full participation in education, employment, and business opportunities available to the general public. The Americans with Disabilities Act (ADA) was passed in recognition of the discrimination faced by people with disabilities. It is plausible that many individuals with disabilities—especially persons with severe disabilities (e.g., significant mobility, vision, or hearing impairments)—may be socially and economically disadvantaged.

III. Under the laws concerning social and economic disadvantage, people with disabilities are not a group presumed to be disadvantaged. Nevertheless, recipients should look carefully at individual showings of disadvantage by individuals with disabilities, making a case-by-case judgment about whether such an individual meets the criteria of this appendix. As public entities subject to Title II of the ADA, recipients must also ensure their DBE programs are accessible to individuals with disabilities. For example, physical barriers or the lack of application and information materials in accessible formats cannot be permitted to thwart the access of potential applicants to the certification process or other services made available to DBEs and applicants.

#### ECONOMIC DISADVANTAGE

(A) *General.* Economically disadvantaged individuals are socially disadvantaged individuals whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same or similar line of business who are not socially disadvantaged.

(B) *Submission of narrative and financial information.*

(1) Each individual claiming economic disadvantage must describe the conditions which are the basis for the claim in a narrative statement, and must submit personal financial information.

(2) [Reserved]

(C) *Factors to be considered.* In considering diminished capital and credit opportunities, recipients will examine factors relating to the personal financial condition of any individual claiming disadvantaged status, including personal income for the past two years (including bonuses and the value of company stock given in lieu of cash), personal net worth, and the fair market value of all assets, whether encumbered or not. Recipients will also consider the financial condition of the applicant compared to the financial profiles of small businesses in the same primary industry classification, or, if not available, in similar lines of business, which are not owned and controlled by socially and economically disadvantaged individuals in evaluating the individual's access to credit and capital. The financial profiles that recipients will compare include total assets, net sales, pre-tax profit, sales/working capital ratio, and net worth.

(D) *Transfers within two years.*

(1) Except as set forth in paragraph (D)(2) of this appendix, recipients will attribute to an individual claiming disadvantaged status any assets which that individual has transferred to an immediate family member, or to

**Pt. 26, App. E**

**49 CFR Subtitle A (10-1-10 Edition)**

a trust, a beneficiary of which is an immediate family member, for less than fair market value, within two years prior to a concern's application for participation in the DBE program, unless the individual claiming disadvantaged status can demonstrate that the transfer is to or on behalf of an immediate family member for that individual's education, medical expenses, or some other form of essential support.

(2) Recipients will not attribute to an individual claiming disadvantaged status any assets transferred by that individual to an immediate family member that are consistent

with the customary recognition of special occasions, such as birthdays, graduations, anniversaries, and retirements.

(3) In determining an individual's access to capital and credit, recipients may consider any assets that the individual transferred within such two-year period described by paragraph (D)(1) of this appendix that are not considered in evaluating the individual's assets and net worth (e.g., transfers to charities).

[64 FR 5126, Feb. 2, 1999, as amended at 68 FR 35559, June 16, 2003]

## APPENDIX F TO PART 26—UNIFORM CERTIFICATION APPLICATION FORM

INSTRUCTIONS FOR COMPLETING THE DISADVANTAGED BUSINESS ENTERPRISE (DBE)  
PROGRAM UNIFORM CERTIFICATION APPLICATION

**NOTE:** If you require additional space for any question in this application, please attach additional sheets or copies as needed, taking care to indicate on each attached sheet/copy the section and number of this application to which it refers.

## Section 1: CERTIFICATION INFORMATION

## A. Prior/Other Certifications

Check the appropriate box indicating for which program your firm is currently certified. If you are already certified as a DBE, indicate in the appropriate box the name of the certifying agency that has previously certified your firm, and also indicate whether your firm has undergone an onsite visit. If your firm has already undergone an onsite visit/review, indicate the most recent date of that review and the state UCP that conducted the review.

**NOTE:** If your firm is currently certified under the SBA's 8(a) and/or SDB programs, you may not have to complete this application. You should contact your state UCP to find out about a streamlined application process for firms that are already certified under the 8(a) and SDB programs.

## B. Prior/Other Applications and Privileges

Indicate whether your firm or any of the persons listed has ever withdrawn an application for a DBE program or an SBA 8(a) or SDB program, or whether any have ever been denied certification, decertified, debarred, suspended, or had bidding privileges denied or restricted by any state or local agency or Federal entity. If your answer is yes, indicate the date of such action, identify the name of the agency, and explain fully the nature of the action in the space provided.

## Section 2: GENERAL INFORMATION

## A. Contact Information

- (1) State the name and title of the person who will serve as your firm's primary contact under this application.
- (2) State the legal name of your firm, as indicated in your firm's Articles of Incorporation or charter.
- (3) State the primary phone number of your firm.
- (4) State a secondary phone number, if any.
- (5) State your firm's fax number, if any.
- (6) State your firm's or your contact person's email address.
- (7) State your firm's website address, if any.
- (8) State the street address of your firm (i.e., the physical location of its offices — not a post office box address).
- (9) State the mailing address of your firm, if it is different from your firm's street address.

## B. Business Profile

- (1) In the box provided, briefly describe the primary business and professional activities in which your firm engages.
- (2) State the Federal Tax ID number of your firm as provided on your firm's filed tax returns, if you have one. This could also be the Social Security number of the owner of your firm.
- (3) State the date on which your firm was officially established, as stated in your firm's Articles of Incorporation or charter.

- (4) State the date on which you and/or each other owner took ownership of the firm.

- (5) Check the appropriate box that describes the manner in which you and each other owner acquired ownership of your firm. If you checked "Other," explain in the space provided.

- (6) Check the appropriate box that indicates whether your firm is "for profit."

**NOTE:** If you checked "No," then you do NOT qualify for the DBE program and therefore do not need to complete the rest of this application. The DBE program requires all participating firms be for-profit enterprises.

- (7) Check the appropriate box that describes the legal form of ownership of your firm, as indicated in your firm's Articles of Incorporation or charter. If you checked "Other," briefly explain in the space provided.

- (8) Check the appropriate box that indicates whether your firm has ever existed under different ownership, a different type of ownership, or a different name. If you checked "Yes," specify which and briefly explain the circumstances in the space provided.

- (9) Indicate in the spaces provided how many employees your firm has, specifying the number of employees who work on a full-time and part-time basis.

- (10) Specify the total gross receipts of your firm for each of the past three years, as declared in your firm's filed tax returns.

## C. Relationships with Other Businesses

- (1) Check the appropriate box that indicates whether your firm is co-located at any of its business locations, or whether your firm shares a telephone number(s), a post office box, any office space, a yard, warehouse, other facilities, any equipment, or any office staff with any other business, organization, or entity of any kind. If you answered "Yes," then specify the name of the other firm(s) and briefly explain the nature of the shared facilities or other items in the space provided.

- (2) Check the appropriate box that indicates whether at present, or at any time in the past:

- (a) Your firm has been a subsidiary of any other firm;
- (b) Your firm consisted of a partnership in which one or more of the partners are other firms;
- (c) Your firm has owned any percentage of any other firm; and
- (d) Your firm has had any subsidiaries of its own.

- (3) Check the appropriate box that indicates whether any other firm has ever had an ownership interest in your firm.

- (4) If you answered "Yes" to any of the questions in (2)(a)-(d) or (3), identify the name, address and type of business for each.

**D. Immediate Family Member Businesses**

Check the appropriate box that indicates whether any of your immediate family members own or manage another company. An "immediate family member" is any person who is your father, mother, husband, wife, son, daughter, brother, sister, grandmother, grandfather, grandson, granddaughter, mother-in-law, or father-in-law. If you answered "Yes," provide the name of each relative, your relationship to them, the name of the company they own or manage, the type of business, and whether they own or manage the company.

**Section 3: OWNERSHIP**

Identify all individuals or holding companies with any ownership interest in your firm, providing the information requested below (if your firm has more than one owner, provide completed copies of this section for each additional owner):

**A. Background Information**

- (1) Give the name of the owner.
- (2) State his/her title or position within your firm.
- (3) Give his/her home phone number.
- (4) State his/her home (street) address.
- (5) Check the appropriate box that indicates this owner's gender.
- (6) Check the appropriate box that indicates this owner's ethnicity (check all that apply). If you checked "Other," specify this owner's ethnic group/identity not otherwise listed.
- (7) Check the appropriate box to indicate whether this owner is a U.S. citizen.
- (8) If this owner is not a U.S. citizen, check the appropriate box that indicates whether this owner is a lawfully admitted permanent resident. If this owner is neither a U.S. citizen nor a lawfully admitted permanent resident of the U.S., then this owner is NOT eligible for certification as a DBE owner. This, however, does not necessarily disqualify your firm altogether from the DBE program if another owner is a U.S. citizen or lawfully admitted permanent resident and meets the program's other qualifying requirements.

**B. Ownership Interest**

- (1) State the number of years during which this owner has been an owner of your firm.
- (2) Indicate the dollar value of this owner's initial investment to acquire an ownership interest in your firm, broken down by cash, real estate, equipment, and/or other investment.
- (3) State the percentage of total ownership control of your firm that this owner possesses.
- (4) State the familial relationship of this owner to each other owner of your firm.
- (5) Indicate the number, percentage of the total, class, date acquired, and method by which this owner acquired his/her shares of stock in your firm.

- (6) Check the appropriate box that indicates whether this owner performs a management or supervisory function for any other business. If you checked "Yes," state the name of the other business and this owner's function or title held in that business.
- (7) Check the appropriate box that indicates whether this owner owns or works for any other firm(s) that has any relationship with your firm. If you checked "Yes," identify the name of the other business and this owner's function or title held in that business. Briefly describe the nature of the business relationship in the space provided.

**C. Disadvantaged Status**

**NOTE:** You only need to complete this section for each owner that is applying for DBE qualification (i.e., for each owner who is claiming to be "socially and economically disadvantaged" and whose ownership interest is to be counted toward the control and 51% ownership requirements of the DBE program).

- (1) Indicate in the space provided the total Personal Net Worth (PNW) of each owner who is applying for DBE qualification. Use the PNW calculator form at the end of this application to compute each owner's PNW.
- (2) Check the appropriate box that indicates whether any trust has ever been created for the benefit of this disadvantaged owner. If you answered "Yes," briefly explain the nature, history, purpose, and current value of the trust(s).

**Section 4: CONTROL**

**A. Identify your firm's Officers and Board of Directors:**

- (1) In the space provided, state the name, title, date of appointment, ethnicity, and gender of each officer of your firm.
- (2) In the space provided, state the name, title, date of appointment, ethnicity, and gender of each individual serving on your firm's Board of Directors.
- (3) Check the appropriate box that indicates whether any of your firm's officers and/or directors listed above perform a management or supervisory function for any other business. If you answered "Yes," identify each person by name, his/her title, the name of the other business in which s/he is involved, and his/her function performed in that other business.
- (4) Check the appropriate box that indicates whether any of your firm's officers and/or directors listed above own or work for any other firm(s) that has a relationship with your firm. If you answered "Yes," identify the name of the firm, the officer or director, and the nature of his/her business relationship with that other firm.

**B. Identify your firm's management personnel (by name, title, ethnicity, and gender) who control your firm in the following areas:**

- (1) Making financial decisions on your firm's behalf, including the acquisition of lines of credit, surety bonds, supplies, etc.;
  - (2) Estimating and bidding, including calculation of cost estimates, bid preparation and submission;
  - (3) Negotiating and contract execution, including participation in any of your firm's negotiations and executing contracts on your firm's behalf;
  - (4) Hiring and/or firing of management personnel, including interviewing and conducting performance evaluations;
  - (5) Field/Production operations supervision, including site supervision, scheduling, project management services, etc.;
  - (6) Office management;
  - (7) Marketing and sales;
  - (8) Purchasing of major equipment;
  - (9) Signing company checks (for any purpose); and
  - (10) Conducting any other financial transactions on your firm's behalf not otherwise listed.
  - (11) Check the appropriate box that indicates whether any of the persons listed in (1) through (10) above perform a management or supervisory function for any other business. If you answered "Yes," identify each person by name, his/her title, the name of the other business in which s/he is involved, and his/her function performed in that other business.
  - (12) Check the appropriate box that indicates whether any of the persons listed in (1) through (10) above own or work for any other firm(s) that has a relationship with your firm. If you answered "Yes," identify the name of the firm, the name of the person, and the nature of his/her business relationship with that other firm.
- C. Indicate your firm's inventory in the following categories:**
- (1) **Equipment**  
State the type, make and model, and current dollar value of each piece of equipment held and/or used by your firm. Indicate whether each piece is either owned or leased by your firm.
  - (2) **Vehicles**  
State the type, make and model, and current dollar value of each motor vehicle held and/or used by your firm. Indicate whether each vehicle is either owned or leased by your firm.
  - (3) **Office Space**  
State the street address of each office space held and/or used by your firm. Indicate whether your firm owns or leases the office space and the current dollar value of that property or its lease.
  - (4) **Storage Space**  
State the street address of each storage space held and/or used by your firm. Indicate whether your firm owns or leases the storage space and the current dollar value of that property or its lease.
- D. Does your firm rely on any other firm for management functions or employee payroll?**  
Check the appropriate box that indicates whether your firm relies on any other firm for management functions or for employee payroll. If you answered "Yes," briefly explain the nature of that reliance and the extent to which the other firm carries out such functions.
- E. Financial Information**
- (1) **Banking Information**
    - (a) State the name of your firm's bank.
    - (b) State the main phone number of your firm's bank branch.
    - (c) State the address of your firm's bank branch.
  - (2) **Bonding Information**
    - (a) State your firm's Binder Number.
    - (b) State the name of your firm's bond agent and/or broker.
    - (c) State your agent's/broker's phone number.
    - (d) State your agent's/broker's address.
    - (e) State your firm's bonding limits (in dollars), specifying both the Aggregate and Project Limits.
- F. Identify all sources, amounts, and purposes of money loaned to your firm, including the names of persons or firms securing the loan, if other than the listed owner:**  
State the name and address of each source, the name of the person securing the loan, the original dollar amount and the current balance of each loan, and the purpose for which each loan was made to your firm.
- G. List all contributions or transfers of assets to/from your firm and to/from any of its owners over the past two years:**  
Indicate in the spaces provided, the type of contribution or asset that was transferred, its current dollar value, the person or firm from whom it was transferred, the person or firm to whom it was transferred, the relationship between the two persons and/or firms, and the date of the transfer.
- H. List current licenses/permits held by any owner or employee of your firm.**  
List the name of each person in your firm who holds a professional license or permit, the type of license or permit, the expiration date of the permit or license, and the license/permit number and issuing State of the license or permit.
- I. List the three largest contracts completed by your firm in the past three years, if any.**  
List the name of each owner or contractor for each contract, the name and location of the projects under each contract, the type of work performed on each contract, and the dollar value of each contract.
- J. List the three largest active jobs on which your firm is currently working.**  
For each active job listed, state the name of the prime contractor and the project number, the location, the type of work performed, the project start date, the anticipated completion date, and the dollar value of the contract.
- AFFIDAVIT & SIGNATURE**  
Carefully read the attached affidavit in its entirety. Fill in the required information for each blank space, and sign and date the affidavit in the presence of a Notary Public, who must then notarize the form.

**DISADVANTAGED BUSINESS ENTERPRISE PROGRAM**  
**49 C.F.R. PART 26**

***UNIFORM CERTIFICATION APPLICATION***

**ROADMAP FOR APPLICANTS**

- ① **Should I apply?**
  - Is your firm at least 51%-owned by a socially and economically disadvantaged individual(s) who also controls the firm?
  - Is the disadvantaged owner a U.S. citizen or lawfully admitted permanent resident of the U.S.?
  - Is your firm a small business that meets the Small Business Administration's (SBA's) size standard and does not exceed \$17.42 million in gross annual receipts?
  - Is your firm organized as a for-profit business?

⇒ If you answered "Yes" to all of the questions above, you may be eligible to participate in the U.S. DOT DBE program.
- ② **Is there an easier way to apply?**

If you are currently certified by the SBA as an 8(a) and/or SDB firm, you may be eligible for a streamlined certification application process. Under this process, the certifying agency to which you are applying will accept your current SBA application package in lieu of requiring you to fill out and submit this form.

**NOTE:** You must still meet the requirements for the DBE program, including undergoing an on-site review.
- ③ **Be sure to attach all of the required documents listed in the Documents Check List at the end of this form with your completed application.**
- ④ **Where can I find more information?**
  - U.S. DOT – <http://osdbuweb.dot.gov/business/dbe/index.html> (this site provides useful links to the rules and regulations governing the DBE program, questions and answers, and other pertinent information)
  - SBA – <http://www.ntis.gov/naics> (provides a listing of NAICS codes) and <http://www.sba.gov/size/indextableofsize.html> (provides a listing of NAICS codes)
  - 49 CFR Part 26 (the rules and regulations governing the DBE program)

Under Sec. 26.107 of 49 CFR Part 26, dated February 2, 1999, if at any time, the Department or a recipient has reason to believe that any person or firm has willfully and knowingly provided incorrect information or made false statements, the Department may initiate suspension or debarment proceedings against the person or firm under 49 CFR Part 29, Governmentwide Debarment and Suspension (nonprocurement) and Governmentwide Requirements for Drug-free Workplace (grants), take enforcement action under 49 CFR Part 31, Program Fraud and Civil Remedies, and/or refer the matter to the Department of Justice for criminal prosecution under 18 U.S.C. 1001, which prohibits false statements in Federal programs.

## Section 1: CERTIFICATION INFORMATION

## A. Prior/Other Certifications

Is your firm currently certified for any of the following programs? (If Yes, check appropriate box(es))	<input type="checkbox"/> DBE	Name of certifying agency:
		Has your firm's state UCP conducted an on-site visit?
	<input type="checkbox"/> 8(a)	<input type="checkbox"/> Yes, on ____ / ____ / ____ State: <input type="checkbox"/> No
	<input type="checkbox"/> SDB	<b>⊗ STOP!</b> If you checked either the 8(a) or SDB box, you <u>may not</u> have to complete this application. Ask your state UCP about the streamlined application process under the SBA-DOT MOU.

## B. Prior/Other Applications and Privileges

Has your firm (under any name) or any of its owners, Board of Directors, officers or management personnel, ever withdrawn an application for any of the programs listed above, or ever been denied certification, decertified, or debarred or suspended or otherwise had bidding privileges denied or restricted by any state or local agency, or Federal entity?

☐ Yes, on \_\_\_\_ / \_\_\_\_ / \_\_\_\_ ☐ No

If Yes, identify State and name of state, local, or Federal agency and explain the nature of the action:

## Section 2: GENERAL INFORMATION

## A. Contact Information

(1) Contact person and Title:		(2) Legal name of firm:	
(3) Phone #:	(4) Other Phone #:	(5) Fax #:	
(6) E-mail:		(7) Website (if have one):	
(8) Street address of firm (No P.O. Box):	City:	County/Parish:	State: Zip:
(9) Mailing address of firm (if different):	City:	County/Parish:	State: Zip:

## B. Business Profile

(1) Describe the primary activities of your firm:		(2) Federal Tax ID (if any):
(3) This firm was established on ____ / ____ / ____		(4) I/We have owned this firm since: ____ / ____ / ____
(5) Method of acquisition (check all that apply): <input type="checkbox"/> Started new business <input type="checkbox"/> Bought existing business <input type="checkbox"/> Inherited business <input type="checkbox"/> Secured concession <input type="checkbox"/> Merger or consolidation <input type="checkbox"/> Other (explain)		
(6) Is your firm "for profit"? <input type="checkbox"/> Yes <input type="checkbox"/> No		<b>⊗ STOP!</b> If your firm is NOT for-profit, then you do NOT qualify for this program and do NOT need to fill out this application.

(7) Type of firm (check all that apply):		
<input type="checkbox"/> Sole Proprietorship <input type="checkbox"/> Partnership <input type="checkbox"/> Corporation <input type="checkbox"/> Limited Liability Partnership <input type="checkbox"/> Limited Liability Corporation <input type="checkbox"/> Joint Venture <input type="checkbox"/> Other, Describe:		
(8) Has your firm ever existed under different ownership, a different type of ownership, or a different name? <input type="checkbox"/> Yes <input type="checkbox"/> No If Yes, explain:		
(9) Number of employees: Full-time	Part-time	Total
(10) Specify the gross receipts of the firm for the last 3 years:		
Year	Year	Total receipts \$
Year	Year	Total receipts \$
Year	Year	Total receipts \$

**C. Relationships with Other Businesses**

(1) Is your firm co-located at any of its business locations, or does it share a telephone number, P.O. Box, office space, yard, warehouse, facilities, equipment, or office staff, with any other business, organization, or entity? <input type="checkbox"/> Yes <input type="checkbox"/> No  If Yes, identify: Other Firm's name: _____ Explain nature of shared facilities: _____		
(2) At present, or at any time in the past, has your firm:	(a) been a subsidiary of any other firm?	<input type="checkbox"/> Yes <input type="checkbox"/> No
	(b) consisted of a partnership in which one or more of the partners are other firms?	<input type="checkbox"/> Yes <input type="checkbox"/> No
	(c) owned any percentage of any other firm?	<input type="checkbox"/> Yes <input type="checkbox"/> No
	(d) had any subsidiaries?	<input type="checkbox"/> Yes <input type="checkbox"/> No
(3) Has any other firm had an ownership interest in your firm at present or at any time in the past? <input type="checkbox"/> Yes <input type="checkbox"/> No		
(4) If you answered "Yes" to any of the questions in (2)(a)-(d) and/or (3), identify the following for each (attach extra sheets, if needed):		
<u>Name</u>	<u>Address</u>	<u>Type of Business</u>
1.		
2.		
3.		

**D. Immediate Family Member Businesses**

Do any of your immediate family members own or manage another company? <input type="checkbox"/> Yes <input type="checkbox"/> No				
If Yes, then list (attach extra sheets, if needed):				
<u>Name</u>	<u>Relationship</u>	<u>Company</u>	<u>Type of Business</u>	<u>Own or Manage?</u>
1.				
2.				

## Section 3: OWNERSHIP

Identify all individuals or holding companies with any ownership interest in your firm, providing the information requested below (If more than one owner, attach separate sheets for each additional owner):

## A. Background Information

(1) Name:	(2) Title:	(3) Home Phone #:
(4) Home Address (street and number):		City: State: Zip:
(5) Gender: <input type="checkbox"/> Male <input type="checkbox"/> Female	(6) Ethnic group membership (Check all that apply):	
(7) U.S. Citizen: <input type="checkbox"/> Yes <input type="checkbox"/> No	<input type="checkbox"/> Black <input type="checkbox"/> Hispanic <input type="checkbox"/> Native American	
(8) Lawfully Admitted Permanent Resident:	<input type="checkbox"/> Asian Pacific <input type="checkbox"/> Subcontinent Asian	
<input type="checkbox"/> Yes <input type="checkbox"/> No	<input type="checkbox"/> Other (specify):	

## B. Ownership Interest

(1) Number of years as owner:	(2) Initial investment to acquire ownership interest in firm:	Type	Dollar Value
(3) Percentage owned:		Cash	\$
(4) Familial relationship to other owners:		Real Estate	\$
		Equipment	\$
		Other	\$
(5) Shares of Stock:	Number	Percentage	Class Date acquired Method Acquired
(6) Does this owner perform a management or supervisory function for any other business? <input type="checkbox"/> Yes <input type="checkbox"/> No			
If Yes, identify: Name of Business: Function/Title:			
(7) Does this owner own or work for any other firm(s) that has a relationship with this firm (e.g., ownership interest, shared office space, financial investments, equipment, leases, personnel sharing, etc.)? <input type="checkbox"/> Yes <input type="checkbox"/> No			
If Yes, identify: Name of Business: Function/Title:			
Nature of Business Relationship:			

## C. Disadvantaged Status – NOTE: Complete this section only for each owner applying for DBE qualification (i.e., for each owner claiming to be socially and economically disadvantaged)

(1) What is the Personal Net Worth (PNW) of the owner(s) applying for DBE qualification? (Use and attach the Personal Net Worth calculator form at the end of this application, attach additional sheets if more than one owner is applying)
(2) Has any trust been created for the benefit of this disadvantaged owner(s)? <input type="checkbox"/> Yes <input type="checkbox"/> No
If Yes, explain (attach additional sheets if needed):

## Section 4: CONTROL

## A. Identify your firm's Officers &amp; Board of Directors (If additional space is required, attach a separate sheet):

	Name	Title	Date Appointed	Ethnicity	Gender
(1) Officers of the Company	(a)				
	(b)				
	(c)				
	(d)				
	(e)				
(2) Board of Directors	(a)				
	(b)				
	(c)				
	(d)				
	(e)				

(3) Do any of the persons listed in (1) and/or (2) above perform a management or supervisory function for any other business? ☐ Yes ☐ No

If Yes, identify for each: Person: \_\_\_\_\_ Title: \_\_\_\_\_  
Business: \_\_\_\_\_ Function: \_\_\_\_\_

(4) Do any of the persons listed (1) and/or (2) above own or work for any other firm(s) that has a relationship with this firm (e.g., ownership interest, shared office space, financial investments, equipment, leases, personnel sharing, etc.)? ☐ Yes ☐ No

If Yes, identify for each: Firm Name: \_\_\_\_\_ Person: \_\_\_\_\_  
Nature of Business Relationship: \_\_\_\_\_

## B. Identify your firm's management personnel who control your firm in the following areas (If more than two persons, attach a separate sheet):

	Name	Title	Ethnicity	Gender
(1) Financial Decisions (responsibility for acquisition of lines of credit, surety bonding, supplies, etc.)	a.			
	b.			
(2) Estimating and bidding	a.			
	b.			
(3) Negotiating and Contract Execution	a.			
	b.			
(4) Hiring/firing of management personnel	a.			
	b.			
(5) Field/Production Operations Supervisor	a.			
	b.			
(6) Office management	a.			
	b.			
(7) Marketing/Sales	a.			
	b.			
(8) Purchasing of major equipment	a.			
	b.			
(9) Authorized to Sign Company Checks (for any purpose)	a.			
	b.			
(10) Authorized to make Financial Transactions	a.			
	b.			

(11) Do any of the persons listed in (1) through (10) above perform a management or supervisory function for any other business? ☐ Yes ☐ No  
If Yes, identify for each: Person: \_\_\_\_\_ Title: \_\_\_\_\_  
Business: \_\_\_\_\_ Function: \_\_\_\_\_

(12) Do any of the persons listed in (1) through (10) above own or work for any other firm(s) that has a relationship with this firm (e.g., ownership interest, shared office space, financial investments, equipment, leases, personnel sharing, etc.)?  
☐ Yes ☐ No  
If Yes, identify for each: Firm Name: \_\_\_\_\_ Person: \_\_\_\_\_  
Nature of Business Relationship: \_\_\_\_\_

C. Indicate your firm's inventory in the following categories (attach additional sheets if needed):

(1) Equipment

Type of Equipment	Make/Model	Current Value	Owned or Leased?
(a)			
(b)			
(c)			

(2) Vehicles

Type of Vehicle	Make/Model	Current Value	Owned or Leased?
(a)			
(b)			
(c)			

(3) Office Space

Street Address	Owned or Leased?	Current Value of Property or Lease
(a)		
(b)		

(4) Storage Space

Street Address	Owned or Leased?	Current Value of Property or Lease
(a)		
(b)		

D. Does your firm rely on any other firm for management functions or employee payroll? ☐ Yes ☐ No

If Yes, explain:

E. Financial Information

(1) Banking Information:

(a) Name of bank: \_\_\_\_\_ (b) Phone No.: ( ) \_\_\_\_\_  
(c) Address of bank: \_\_\_\_\_ City: \_\_\_\_\_ State: \_\_\_\_\_ Zip: \_\_\_\_\_

(2) Bonding Information: If you have bonding capacity, identify:		(a) Binder No.:
(b) Name of agent/broker:	(c) Phone No. ( )	
(d) Address of agent/broker:	City:	State: Zip:
(e) Bonding limit: Aggregate limit \$	Project limit \$	

F. Identify all sources, amounts, and purposes of money loaned to your firm, including the names of any persons or firms securing the loan, if other than the listed owner:

Name of Source	Address of Source	Name of Person Securing the Loan	Original Amount	Current Balance	Purpose of Loan
1.					
2.					
3.					

G. List all contributions or transfers of assets to/from your firm and to/from any of its owners over the past two years (attach additional sheets if needed):

Contribution/Asset	Dollar Value	From Whom Transferred	To Whom Transferred	Relationship	Date of Transfer
1.					
2.					
3.					

H. List current licenses/permits held by any owner and/or employee of your firm (e.g., contractor, engineer, architect, etc.) (attach additional sheets if needed):

Name of License/Permit Holder	Type of License/Permit	Expiration Date	License Number and State
1.			
2.			
3.			

I. List the three largest contracts completed by your firm in the past three years, if any:

Name of Owner/Contractor	Name/Location of Project	Type of Work Performed	Dollar Value of Contract
1.			
2.			
3.			

J. List the three largest active jobs on which your firm is currently working:

Name of Prime Contractor and Project Number	Location of Project	Type of Work	Project Start Date	Anticipated Completion Date	Dollar Value of Contract
1.					
2.					
3.					

**DBE UNIFORM CERTIFICATION APPLICATION SUPPORTING DOCUMENTS CHECKLIST**  
 In order to complete your application for DBE certification, you must attach copies of all of the following documents as they apply to you and your firm.

**All Applicants**

- ☐ Work experience resumes (include places of ownership/employment with corresponding dates), for all owners and officers of your firm
- ☐ Personal Financial Statement (form available with this application)
- ☐ Personal tax returns for the past three years, if applicable, for each owner claiming disadvantaged status
- ☐ Your firm's tax returns (gross receipts) and all related schedules for the past three years
- ☐ Documented proof of contributions used to acquire ownership for each owner (*e.g., both sides of cancelled checks*)
- ☐ Your firm's signed loan agreements, security agreements, and bonding forms
- ☐ Descriptions of all real estate (including office/storage space, etc.) owned/leased by your firm and documented proof of ownership/signed leases
- ☐ List of equipment leased and signed lease agreements
- ☐ List of construction equipment and/or vehicles owned and titles/proof of ownership
- ☐ Documented proof of any transfers of assets to/from your firm and/or to/from any of its owners over the past two years
- ☐ Year-end balance sheets and income statements for the past three years (*or life of firm, if less than three years*); a new business must provide a current balance sheet
- ☐ All relevant licenses, license renewal forms, permits, and haul authority forms
- ☐ DBE and SBA 8(a) or SDB certifications, denials, and/or decertifications, if applicable
- ☐ Bank authorization and signatory cards
- ☐ Schedule of salaries (or other compensation or remuneration) paid to all officers, managers, owners, and/or directors of the firm
- ☐ Trust agreements held by any owner claiming disadvantaged status, if any

**Partnership or Joint Venture**

- ☐ Original and any amended Partnership or Joint Venture Agreements

**Corporation or LLC**

- ☐ Official Articles of Incorporation (*signed by the state official*)
- ☐ Both sides of all corporate stock certificates and your firm's stock transfer ledger
- ☐ Shareholders' Agreement
- ☐ Minutes of all stockholders and board of directors meetings
- ☐ Corporate by-laws and any amendments
- ☐ Corporate bank resolution and bank signature cards
- ☐ Official Certificate of Formation and Operating Agreement with any amendments (for LLCs)

**Trucking Company**

- ☐ Documented proof of ownership of the company
- ☐ Insurance agreements for each truck owned or operated by your firm
- ☐ Title(s) and registration certificate(s) for each truck owned or operated by your firm
- ☐ List of U.S. DOT numbers for each truck owned or operated by your firm

**Regular Dealer**

- ☐ Proof of warehouse ownership or lease
- ☐ List of product lines carried
- ☐ List of distribution equipment owned and/or leased

**NOTE:** The specific state UCP to which you are applying may have additional required documents that you must also supply with your application. Contact the appropriate certifying agency to which you are applying to find out if more is required.

**AFFIDAVIT OF CERTIFICATION**

*This form must be signed and notarized for each owner upon which disadvantaged status is relied.*

**A MATERIAL OR FALSE STATEMENT OR OMISSION MADE IN CONNECTION WITH THIS APPLICATION IS SUFFICIENT CAUSE FOR DENIAL OF CERTIFICATION, REVOCATION OF A PRIOR APPROVAL, INITIATION OF SUSPENSION OR DEBARMENT PROCEEDINGS, AND MAY SUBJECT THE PERSON AND/OR ENTITY MAKING THE FALSE STATEMENT TO ANY AND ALL CIVIL AND CRIMINAL PENALTIES AVAILABLE PURSUANT TO APPLICABLE FEDERAL AND STATE LAW.**

I \_\_\_\_\_ (full name printed), swear or affirm under penalty of law that I am \_\_\_\_\_ (title) of applicant firm \_\_\_\_\_ (firm name) and that I have read and understood all of the questions in this application and that all of the foregoing information and statements submitted in this application and its attachments and supporting documents are true and correct to the best of my knowledge, and that all responses to the questions are full and complete, omitting no material information. The responses include all material information necessary to fully and accurately identify and explain the operations, capabilities and pertinent history of the named firm as well as the ownership, control, and affiliations thereof.

I recognize that the information submitted in this application is for the purpose of inducing certification approval by a government agency. I understand that a government agency may, by means it deems appropriate, determine the accuracy and truth of the statements in the application, and I authorize such agency to contact any entity named in the application, and the named firm's bonding companies, banking institutions, credit agencies, contractors, clients, and other certifying agencies for the purpose of verifying the information supplied and determining the named firm's eligibility.

I agree to submit to government audit, examination and review of books, records, documents and files, in whatever form they exist, of the named firm and its affiliates, inspection of its place(s) of business and equipment, and to permit interviews of its principals, agents, and employees. I understand that refusal to permit such inquiries shall be grounds for denial of certification.

If awarded a contract or subcontract, I agree to promptly and directly provide the prime contractor, if any, and the Department, recipient agency, or federal funding agency on an ongoing basis, current, complete and accurate information regarding (1) work performed on the project; (2) payments; and (3) proposed changes, if any, to the foregoing arrangements.

I agree to provide written notice to the recipient agency or Unified Certification Program (UCP) of any material change in the information contained in the original application within 30 calendar days of such change (e.g., ownership, address, telephone number, etc.).

I acknowledge and agree that any misrepresentations in this application or in records pertaining to a contract or subcontract will be grounds for terminating any contract or subcontract which may be awarded; denial or revocation of certification; suspension and debarment; and for initiating action under federal and/or state law concerning false statement, fraud or other applicable offenses.

I certify that I am a socially and economically disadvantaged individual who is an owner of the above-referenced firm seeking certification as a Disadvantaged Business Enterprise (DBE). In support of my application, I certify that I am a member of one or more of the following groups, and that I have held myself out as a member of the group(s) (circle all that apply):

Female                      Black American Hispanic American  
Native American           Asian-Pacific American  
Subcontinent Asian American  
Other (specify) \_\_\_\_\_

I certify that I am socially disadvantaged because I have been subjected to racial or ethnic prejudice or cultural bias, or have suffered the effects of discrimination, because of my identity as a member of one or more of the groups identified above, without regard to my individual qualities.

I further certify that my personal net worth does not exceed \$750,000, and that I am economically disadvantaged because my ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same or similar line of business who are not socially and economically disadvantaged.

I declare under penalty of perjury that the information provided in this application and supporting documents is true and correct.

Executed on \_\_\_\_\_ (Date)

Signature \_\_\_\_\_  
(DBE Applicant)

NOTARY CERTIFICATE

# ATTACHMENT B

## HAWAII ADMINISTRATIVE RULES

## TITLE 19

## DEPARTMENT OF TRANSPORTATION

## SUBTITLE 1

## ADMINISTRATION

## CHAPTER 2

PARTICIPATION IN THE DISADVANTAGED BUSINESS ENTERPRISE  
PROGRAM

§19-2-1	Purpose
§19-2-2	Authorization
§19-2-3	Substance of rules
§19-2-4	Adoption
§19-2-5	Applicability
§19-2-6	Repealed
§19-2-6.1	Emergency rulemaking
§19-2-7	Repealed

§19-2-1 Purpose. The purpose of this chapter is to implement the Disadvantaged Business Enterprise ("DBE") Program as required by Title 49, Code of Federal Regulations, Parts 23 and 26, entitled "Participation by Disadvantaged Business Enterprises in Department of Transportation Programs." [Eff 8/4/80; am and comp  
**DEC 20 1999** ] (Auth: HRS §§261-12, 264-23, 264-24, 266-2) (Imp: HRS §§261-12, 264-23, 264-24, 266-2)

§19-2-2 Authorization. The state director of transportation is required to implement a disadvantaged business enterprise program in order to receive federal financial assistance. Sections 261-12, 264-23, 264-24, 266-2, Hawaii Revised Statutes, authorize the state director of transportation to promulgate rules and regulations for the purposes of complying with federal rules and program requirements. The state director of

transportation shall also adopt a program plan that reflects the federal rule requirements referenced in Section 19-2-4. [Eff 8/4/80; am and comp  
 DEC 20 1999 ] (Auth: HRS §§ 261-12, 264-23, 264-24, 266-2) (Imp: HRS §§261-12, 264-23, 264-24, 266-2)

§19-2-3 Substance of rules. Title 49, Code of Federal Regulations, Parts 23 and 26, requires that states participating in the federal transportation program establish a disadvantaged business enterprise program in which firms owned and controlled by minorities and women may participate in federally assisted transportation projects. The State's failure to comply with the federal department of transportation disadvantaged business enterprise rules may result in the termination of the State's financial agreement with the federal Department of Transportation and may affect the State's ability to obtain future federal Department of Transportation grants. [Eff 8/4/80; am and comp  
 DEC 20 1999 ] (Auth: HRS §§ 261-12, 264-23, 264-24, 266-2) (Imp: HRS §§261-12, 264-23, 264-24, 266-2)

§19-2-4 Adoption. The provisions of Title 49, Part 23 Code of Federal Regulations, Participation by Disadvantaged Business Enterprises in the Department of Transportation Programs in Airport Concessions, and Part 26 Disadvantaged Business Enterprises in the Department of Transportation Financial Assistance Programs, are adopted and incorporated by reference as part of the state department of transportation's rules and regulations. [Eff 8/4/80; am and comp  
 DEC 20 1999 ] (Auth: HRS §§261-12, 264-23, 264-24, 266-2) (Imp: HRS §§261-12, 264-23, 264-24, 266-2)

§19-2-5 Applicability. This chapter shall only apply to federal programs that are administered by the state department of transportation by which funds are made available to members of the public for the

§19-2-5

accomplishment of the purposes of the department. [Eff  
8/4/80; am and comp DEC 20 1999 ] (Auth: HRS §§261-  
12, 264-23, 264-24, 266-2) (Imp: HRS §§261-12, 264-23,  
264-24, 266-2)

§19-2-6 REPEALED. [R DEC 20 1999 ]

§19-2-6.1 Emergency rulemaking. The department  
of transportation may adopt emergency rules pursuant to  
the requirements of section 91-3(b), HRS. [Eff and  
comp DEC 20 1999 ] (Auth: HRS §91-2) (Imp: HRS  
§91-3)

§19-2-7 REPEALED. [R DEC 20 1999 ]

Amendments to and compilation of Title 19,  
Subtitle 1, Chapter 2, Hawaii Administrative Rules, on  
the Summary Page dated \_\_\_\_\_ were adopted on  
\_\_\_\_\_ following public hearings that were  
held on \_\_\_\_\_ after  
public notice was given in the \_\_\_\_\_  
on \_\_\_\_\_

They shall take effect ten days after the filing with  
the Office of the Lieutenant Governor.



KAZU HAYASHIDA  
Director of Department of  
Transportation



BENJAMIN J. CAYETANO  
Governor  
State of Hawaii

Dated: 12/8/99

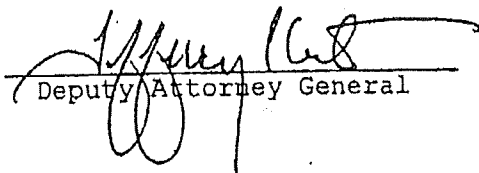
DEC 09 1999

Filed

LIEUTENANT GOVERNOR'S  
OFFICE

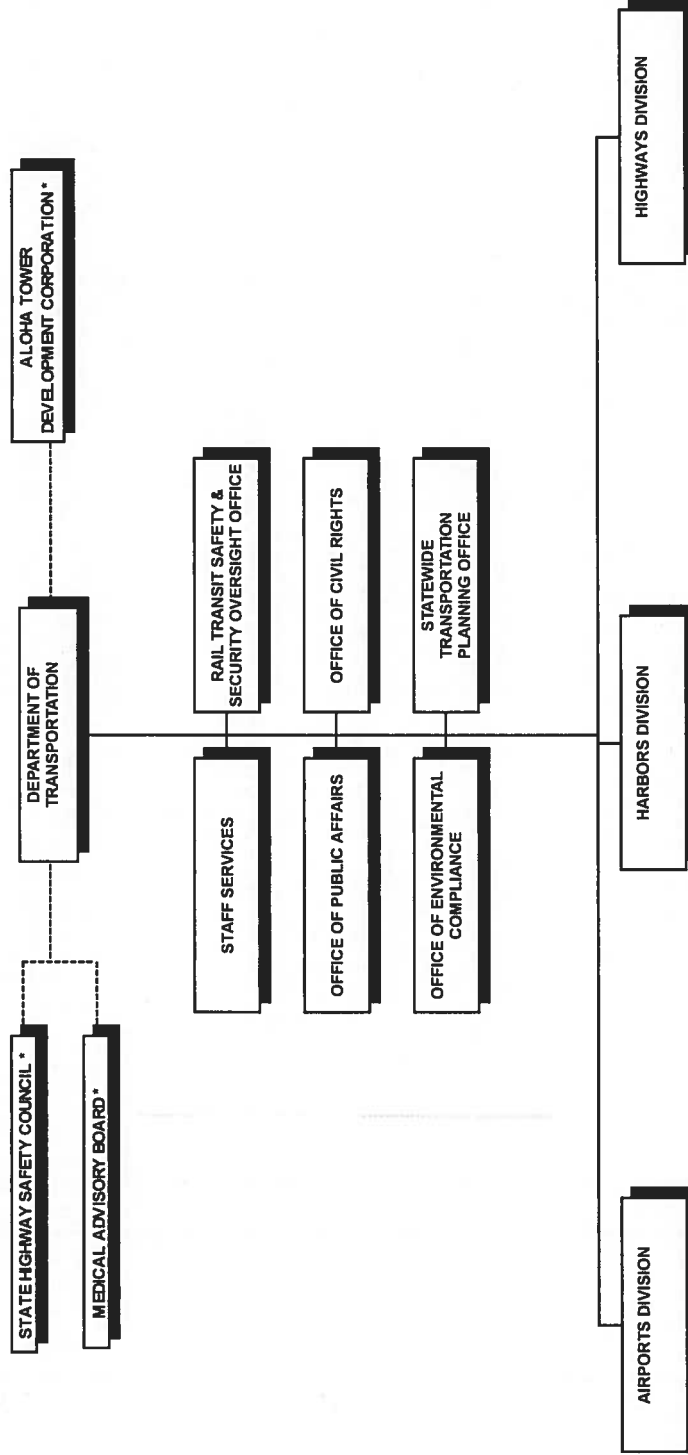
'99 DEC -9 A9:44

APPROVED AS TO FORM:

  
Deputy Attorney General

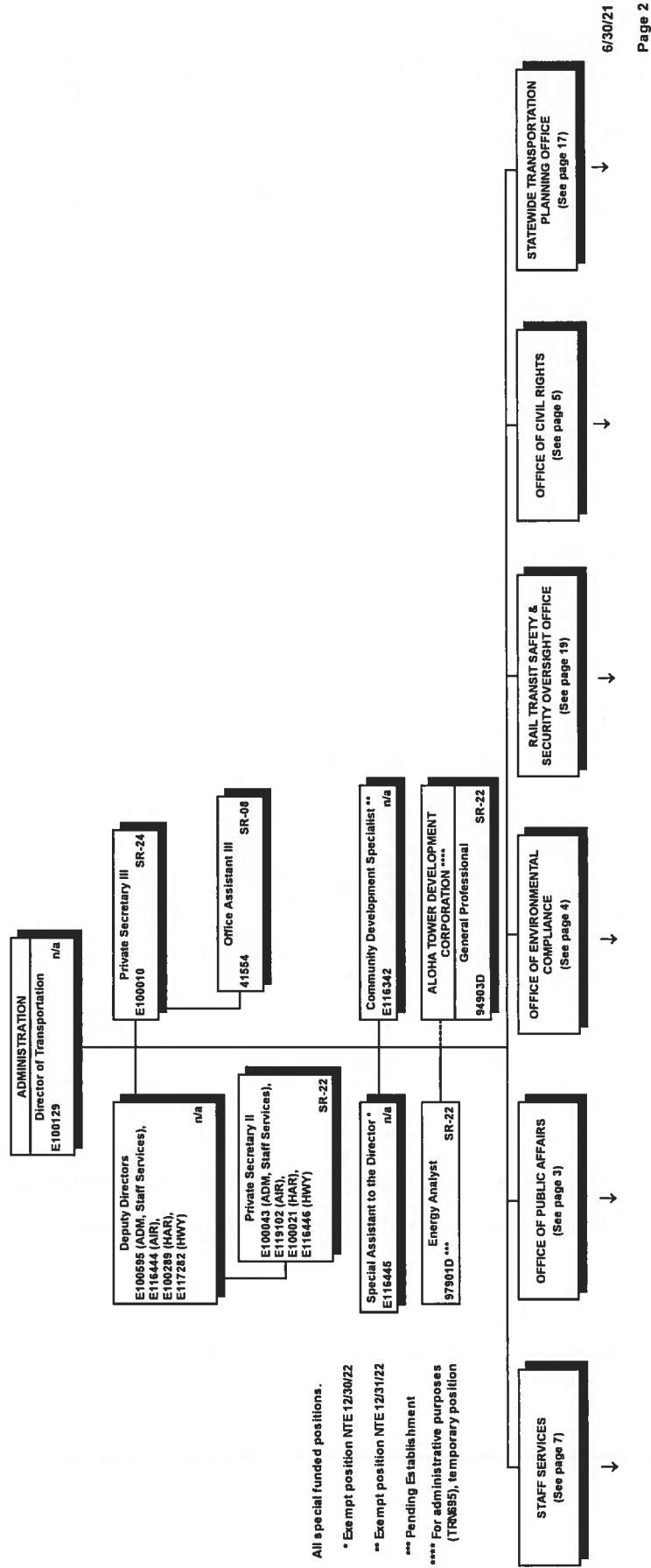
# ATTACHMENT C

STATE OF HAWAII  
DEPARTMENT OF TRANSPORTATION  
ORGANIZATION CHART



\* For administrative purposes

STATE OF HAWAII  
DEPARTMENT OF TRANSPORTATION  
ADMINISTRATION  
POSITION ORGANIZATION CHART



All special funded positions.

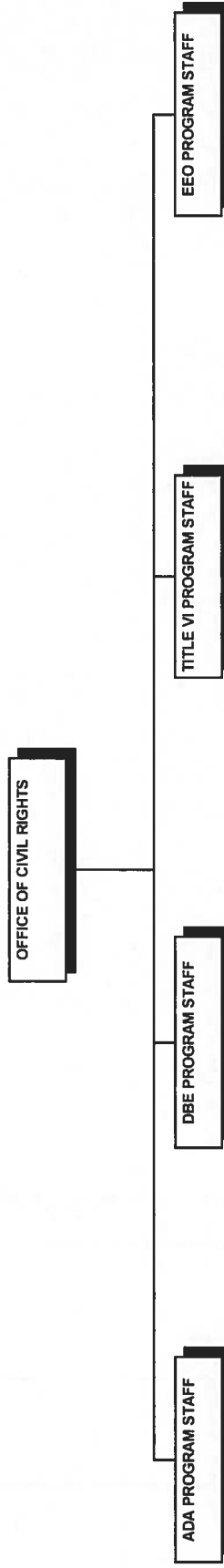
\* Exempt position NTE 12/30/22

\*\* Exempt position NTE 12/31/22

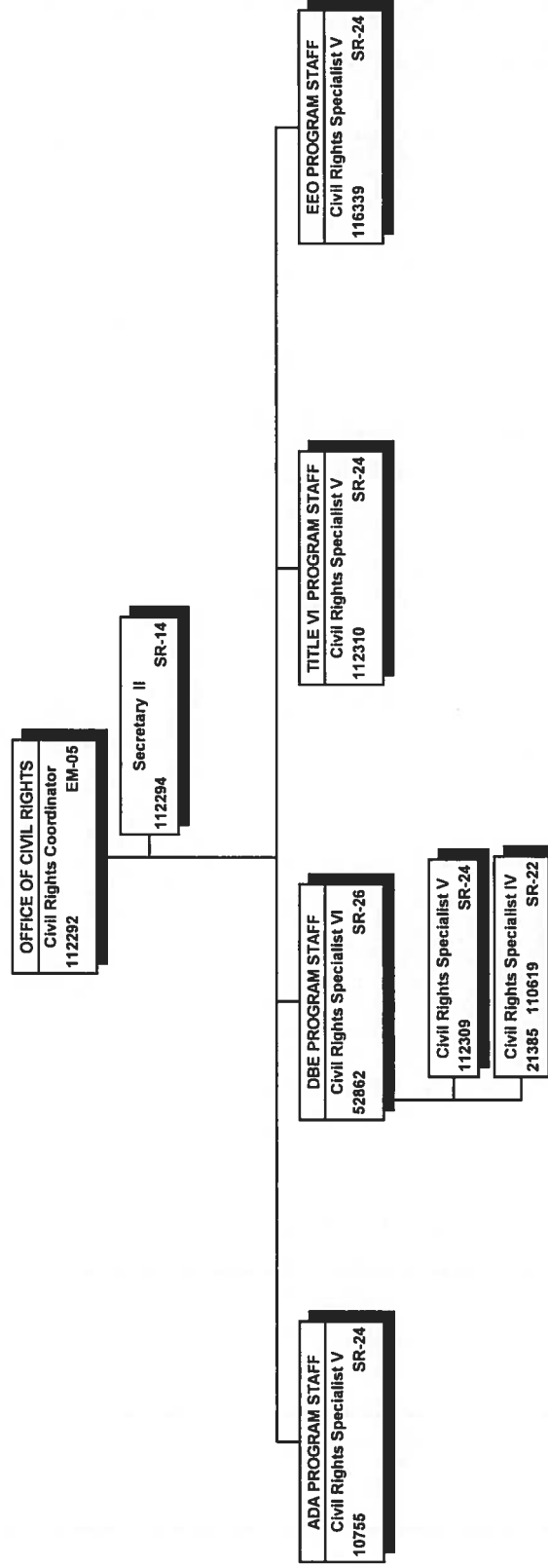
\*\*\* Pending Establishment

\*\*\*\* For administrative purposes  
(TRN695), temporary position

STATE OF HAWAII  
DEPARTMENT OF TRANSPORTATION  
ADMINISTRATION  
OFFICE OF CIVIL RIGHTS  
ORGANIZATION CHART



STATE OF HAWAII  
 DEPARTMENT OF TRANSPORTATION  
 ADMINISTRATION  
 OFFICE OF CIVIL RIGHTS  
 POSITION ORGANIZATION CHART



All special funded positions.

# ATTACHMENT D

DAVID Y. IGE  
GOVERNOR



**STATE OF HAWAII**  
**DEPARTMENT OF TRANSPORTATION**  
869 PUNCHBOWL STREET  
HONOLULU, HAWAII 96813-5097

JADE T. BUTAY  
DIRECTOR

Deputy Directors  
DEREK J. CHOW  
ROSS M. HIGASHI  
EDWIN H. SNIFFEN

IN REPLY REFER TO:  
OCR 1.9133

September 27, 2021

**VIA EMAIL:** FHWA-Hawaii.Intake@dot.gov

Mr. Ralph Rizzo  
Division Administrator  
U. S. Department of Transportation  
Federal Highway Administration  
P. O. Box 50206  
Honolulu, Hawaii 96850

Dear Mr. Rizzo:

**Subject:** Direct Access to the Director of Transportation by the Disadvantaged Business Enterprise (DBE) Liaison Officer

In accordance with Title 49, Code of Federal Regulations, Part 26, §26.25, and the Hawaii Department of Transportation's (HDOT) DBE Program Plan, I affirm that the DBE Program Supervisor, who serves as the DBE Liaison Officer for the HDOT, has direct, independent access to me for all matters related to the DBE Program.

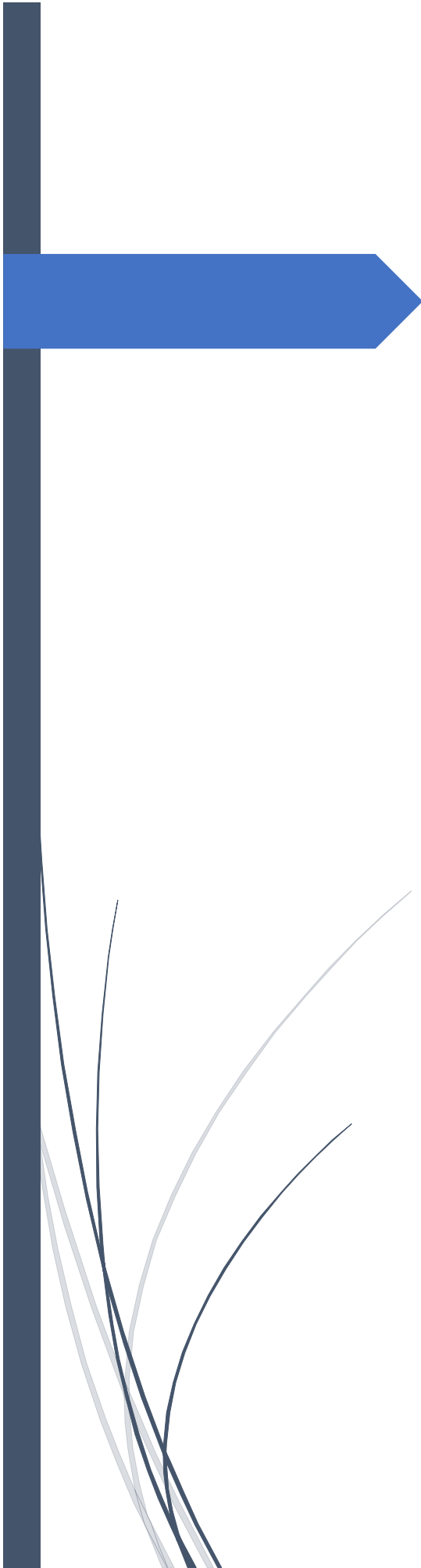
If you have any questions, or require additional information, please contact Melanie Martin, Civil Rights Coordinator at (808) 831-7912 or via email at [melanie.martin@hawaii.gov](mailto:melanie.martin@hawaii.gov).

Sincerely,

A handwritten signature in black ink, appearing to read "Jade T. Butay", is written over a horizontal line.

JADE T. BUTAY  
Director of Transportation

# ATTACHMENT E



# SMALL BUSINESS UTILIZATION PLAN

Revised October 2021

**HAWAII DEPARTMENT OF TRANSPORTATION**

DISADVANTAGED BUSINESS ENTERPRISE PROGRAM JULY 2020

## TABLE OF CONTENTS

Introduction .....	2
Regulatory Requirements .....	3
SBE/ Certification Eligibility Requirements .....	3
Definition of a Small Business .....	4
Business Size .....	4
Personal Net Worth .....	5
SBE Certification Denial and Removal of Certification.....	5
SBE Contract Goals.....	5
SBE Contract Goals on Construction and Construction-Related Professional Services Contracts .....	6
SBE Contract Goals on Design-Build Projects .....	6
Counting SBE Participation .....	7
Good Faith Efforts.....	7
Information Necessary to Evaluate Good Faith Efforts .....	9
Administrative Reconsideration of Good Faith Efforts.....	9
Commercially Useful Function (CUF) .....	10
Monitoring CUF Performance .....	11
Replacement of an SBE on a Project with a Contract Goal.....	11
SBE Set-Asides.....	11

## Introduction

The Hawaii Department of Transportation (HDOT), Office of Civil Rights (OCR) administers the Disadvantaged Business Enterprise (DBE) Program pursuant to Title 49, Code of Federal Regulations, Parts 23 and 26 (“DBE Regulations”). As such, HDOT is committed to non-discrimination based on race, color, national origin, and sex, in its implementation of the DBE Program.

In accordance with §26.39 of the DBE Regulations, this Small Business Utilization Plan was developed to incorporate a small business element into the DBE Program Plan to facilitate participation by small businesses on federal-aid contracts. As part of this Small Business Utilization Plan, HDOT established a Small Business Enterprise (SBE) Program as a race-neutral means to encourage participation by DBEs. The development of a SBE Program is the result of a recommendation made in HDOT’s 2019 Availability and Disparity Study (“Study”).<sup>1</sup>

As noted in the aforementioned Study and in HDOT’s overall goal methodology, HDOT shall implement the SBE Program for the following reasons:

- About 94% of the businesses available for HDOT’s USDOT-funded contracts are within the federal small business size limit based on the revenue they reported in the availability survey for the Study. Of those small businesses, 59% are minority- or women-owned.
- All of the current DBEs in Hawaii would automatically qualify as SBEs.
- Based on anecdotal evidence gathered through the Study’s in-depth interviews, several firms reported that there may be a stigma concerning certification as a “disadvantaged business” that might not arise for small business certification.
- According to the Study, minority and female business owners in Hawaii frequently reported disadvantages because they were a small business competing against large businesses. In Hawaii, some of those large businesses are owned by minorities or women. Large minority-owned firms win a large portion of HDOT’s USDOT-funded contracts.

The balance of this Small Business Utilization Plan sets forth the eligibility requirements for SBE certification, and outlines the two race-neutral methods of SBE contract goals and set-asides that HDOT shall utilize to increase DBE participation through the implementation of the SBE Program.

---

<sup>1</sup> Keen Independent Research LLC, 2019 Availability and Disparity Study – March 2020

## Regulatory Requirements

Section §26.39 of the DBE Regulations states:

“(a) Your DBE program must include an element to structure contracting requirements to facilitate competition by small business concerns, taking all reasonable steps to eliminate obstacles to their participation, including unnecessary and unjustified bundling of contract requirements that may preclude small business participation in procurements as prime contractors or subcontractors.

(b) This element must be submitted to the appropriate DOT operating administration for approval as a part of your DBE program by February 28, 2012. As part of this program element you may include, but are not limited to, the following strategies:

(1) Establishing a race-neutral small business set-aside for prime contracts under a stated amount (*e.g.*, \$1 million).

(2) In multi-year design-build contracts or other large contracts (*e.g.*, for “megaprojects”) requiring bidders on the prime contract to specify elements of the contract or specific subcontracts that are of a size that small businesses, including DBEs, can reasonably perform.

(3) On prime contracts not having DBE contract goals, requiring the prime contractor to provide subcontracting opportunities of a size that small businesses, including DBEs, can reasonably perform, rather than self-performing all the work involved.

(4) Identifying alternative acquisition strategies and structuring procurements to facilitate the ability of consortia or joint ventures consisting of small businesses, including DBEs, to compete for and perform prime contracts.

(5) To meet the portion of your overall goal you project to meet through race-neutral measures, ensuring that a reasonable number of prime contracts are of a size that small businesses, including DBEs, can reasonably perform.

(c) You must actively implement your program elements to foster small business participation. Doing so is a requirement of good faith implementation of your DBE program.”

## SBE Certification Eligibility Requirements

Firms seeking SBE certification must apply through HDOT’s online DBE certification portal, entitled, Certification and Contract Compliance Management System, which can be found at <https://hdot.dbesystem.com/>. The SBE certification application shall mirror the DBE application,

but shall not require the majority owner(s) to be socially disadvantaged. All DBE certified firms shall automatically qualify to be SBE firms. Certified DBE firms shall be notified via email that they qualify for the SBE certification, and will automatically be added to the SBE Directory. If a Hawaii-based firm is not DBE certified, and is applying for an SBE certification, an on-site visit shall be conducted if HDOT requires further information that only an on-site visit could provide, or if there is a third-party complaint that the firm does not qualify as an SBE. For out-of-state firms seeking SBE certification, HDOT shall conduct a virtual on-site visit via MS Team or another effective web-based meeting platform. Once certified, SBE firms shall be subject to the same requirement to submit, on their anniversary date, an annual Affidavit of No Change, and shall be subject to the same reporting requirements as DBE firms.

In order to be eligible for SBE certification, the applicant firm must be a small, for-profit business and the majority owner(s) (51% owned) must be a U.S. citizen, or permanent resident. The majority owner must exhibit control of the small business, and have a personal net worth that does not exceed \$1.32 million, as set forth in §26.67 of the DBE Regulations.

### Definition of a Small Business

HDOT shall follow the DBE Regulations when determining whether a SBE applicant firm is an eligible small business. The DBE Regulations, §26.5 states, “*Small business concern* means, with respect to firms seeking to participate as DBEs in DOT-assisted contracts, a small business concern as defined pursuant to section 3 of the Small Business Act and Small Business Administration regulations implementing it (13 CFR part 121) that also does not exceed the cap on average annual gross receipts specified in §26.65(b).”

### Business Size

Only firms that are considered to be an existing small business shall be eligible for SBE certification. HDOT shall follow the DBE Regulations in determining the business size of the SBE applicant firm. The DBE Regulations §26.65 states,

“(a) To be an eligible DBE, a firm (including its affiliates) must be an existing small business, as defined by Small Business Administration (SBA) standards. As a recipient, you must apply current SBA business size standard(s) found in 13 CFR part 121 appropriate to the type(s) of work the firm seeks to perform in DOT-assisted contracts, including the primary industry classification of the applicant.

(b) Even if it meets the requirements of paragraph (a) of this section, a firm is not an eligible DBE for the purposes of Federal Highway Administration and Federal Transit Administration-assisted work in any Federal fiscal year if the firm (including its affiliates) has had average annual gross receipts, as defined by SBA regulations (see 13 CFR 121.104), over the firm's previous three fiscal years, in excess of \$26.29 million. The Department will adjust this amount for inflation on an annual basis. The adjusted amount will be published on the Department's website in subsequent years.(c) The Department adjusts the number in paragraph (b) of this section annually using the Department of Commerce price deflators for purchases by State and local governments as the basis for this adjustment.”

Similar to the DBE certification application review, HDOT shall request from the SBE applicant firm documents demonstrating that it meets the small business size standard, which may include, but shall not be limited to the following:

1. Federal Tax Returns
2. Financial Statements
3. Proof of current SBA8(a) or DBE certification

It should be noted that if the SBE applicant firm is an 8(a) or DBE certified firm, no additional evidence shall be required by HDOT to demonstrate that the SBE applicant firm meets the small business size standard appropriate to the type of work the SBE firm seeks to perform. However, HDOT reserves the right to request additional information of such firms to ensure that they meet the criterion of a small business.

### Personal Net Worth

The majority owner(s) (i.e. owns 51% or more) of the SBE applicant firm must have a personal net worth that does not exceed \$1.32 million. HDOT shall require the majority owner to submit a Personal Financial Statement (i.e. Appendix G of the DBE Regulations) and the U.S. Individual Tax Return for the majority owner(s) for the two most recent years.

### SBE Certification Denial and Removal of Certification

When an applicant is denied certification as a SBE, the business shall be notified in writing of the reasons for this determination. The burden of proof of eligibility shall be upon the applicant in any such proceeding. The applicant firm may appeal the denial to the Director of Transportation, or designee. The SBE applicant firm is not prohibited from contracting with HDOT during the pendency of its appeal; however, it will be unable to bid on and/or be awarded an SBE set-aside contract while the appeal is pending.

When HDOT intends to decertify a SBE for failure to meet the requirements of this program, or as the result of a third-party challenge, the business shall be notified in writing of HDOT's intent to remove the firm's eligibility. HDOT shall have the burden of proving that the SBE no longer qualifies to be certified as an SBE. The Informal Hearing Procedures set forth in the DBE Program Plan shall be followed for SBEs that have been decertified and request an informal hearing.

### SBE Contract Goals

FHWA has approved a pilot SBE contract goal setting program for a period of one year beginning in May 2021, as a race neutral means to increase DBE participation.. The period may be extended if feasible and if the program is successful in obtaining increased DBE participation. SBE contract goals shall be calculated in the same manner as DBE contract goals.

## SBE Contract Goals on Construction and Construction-Related Professional Services Contracts

HDOT shall set goals on federal-aid construction and professional services contracts when it is determined that subcontracting opportunities may exist.

For each federal-aid project with potential subcontracting opportunities, HDOT shall convene a goal setting committee comprised of the project engineer, Disadvantaged Business Enterprise Liaison Officer (DBELO), divisional DBE Coordinator, and a representative from the respective operating administration (if applicable). The committee will review the engineer's estimate, nature of work on the project, items of work likely to be performed by a subcontractor, and shall determine if there are qualified SBEs that may potentially perform portions of the work. Based on this review, a project goal shall be set for SBE participation. Once the contract is awarded, the project goal, which may be adjusted upwards if the winning bidder obtains more SBE participation than proposed by HDOT, becomes the contract goal.

## SBE Contract Goals on Design-Build Projects

HDOT shall set contract goals on design-build contracts in the following manner. First, HDOT will require the design-build contractor to submit a SBE Performance Plan with its qualifications proposal. The Plan shall include the following elements:

1. A policy statement signed by Design-Build Contractor's Authorized Representative, which express Design-Build Contractor's commitment to utilize SBEs in all aspects of the work, outlines the various levels of responsibilities, and states the objectives of the SBE Performance Plan. The Design-Build Contractor shall obtain the written commitment of all Design-Build Contractor entities to comply with and advance the intent of the policy statement.
2. A description of proposed activities to facilitate SBE engagement in work as subcontractors and subconsultants shall include, at a minimum, the following:
  - a. Participate in a Department sponsored networking event with prospective SBEs that may be ready, willing and able to perform work on this project;
  - b. Conduct bid item specific outreach meetings in coordination with the Department for SBE firms to highlight appropriate subcontracting opportunities;
  - c. Solicit statements of qualification, proposals, and/or price quotations from qualified SBE firms and arrange a time for the review of the qualifications, plans, quantities, specifications, and delivery schedules and for the preparation and presentation of proposals and/or price quotations;
  - d. Encourage eligible SBEs to apply for certification with the Department by the Design and Price Proposal due date;
  - e. Contact minority and women business organizations, small business associations/organizations, contractor associations, and government agencies with programs for disadvantaged individuals for assistance in recruiting and encouraging eligible SBE contractors to apply for certification with the Department; and

- f. Develop an action plan to monitor on-going SBE participation on the project to ensure the Design-Build Contractor is on track to meet the SBE contract goal. The action plan shall include, but is not limited to, regularly scheduled meetings with the Department to address issues that may affect committed SBEs, such as a reduction in the scope of work, and when GFE are necessary to replace a SBE for good cause.
3. The Performance Plan must include planned SBE participation, which may not identify specific SBEs, but generally describes work that may be done by SBEs and an estimated amount that will be performed.

At the time the Design-Build Contractor submits its design and price proposal, the Contractor will be required to submit its SBE documentation, including SBE information, nature of each SBE's work, and estimated bid amounts to demonstrate that it has met the goal, or has made GFE to meet the goal. If the Design-Build Contractor meets these requirements, points shall be awarded in accordance with the evaluation criteria for the design-build project.

## Counting SBE Participation

HDOT will count SBE participation toward contract goals in the same manner as DBE contract goals provided in 49 CFR §26.55. SBE participation on contract goals shall be counted as follows:

1. The entire amount of work actually performed by SBEs on all tiers of a contract to include the cost of materials and supplies obtained or equipment leased by SBEs (except from the prime contractor or its affiliate);
2. One hundred (100) percent of the cost of materials that are obtained from SBE manufacturers;
3. Sixty (60) percent of the cost of materials that are purchased from SBE regular dealers; and
4. The commissions or fees for transactions with SBE suppliers who are not manufacturers or regular dealers.

Credit towards contract goals shall not be allowed until payment is made to SBE firms.

## Good Faith Efforts (GFE)

The GFE requirement as set forth in §26.53 of the DBE Regulations shall apply to SBE contract goals. The HDOT shall include these procedures and any subsequent updates to these provisions, in the contract provisions relating to SBE requirements.

When a project goal is not met, a GFE review committee comprised of the affected division's DBE Coordinator, Operating Administration representative (if available) and the DBELO, shall conduct the initial review of GFE submitted by the bidder/offeror. The GFE review committee shall determine whether the bidder/offeror has performed the quality, quantity, and intensity of efforts that demonstrate a reasonably active and aggressive attempt to meet the contract goal in accordance with 49 CFR Part 26, Appendix A.

The bidder/offeree bears the responsibility of demonstrating that it met the contract goal, or if the contract goal was not met, by documenting the GFE it made in an attempt to meet the goal.

The bidder/offeree shall be required to document all actions taken to meet the contract goal. GFE by the bidder/offeree to meet the contract goal, may include, but are not limited to, the following actions:

1. Whether the bidder/offeree solicited through all reasonable and available means (e.g. attendance at meetings, advertising and/or written notices) the interest of all certified SBEs who have the capability to perform part or all of the work to be included under the contract. HDOT will also consider whether the bidder/offeree solicited the participation of potential SBEs in sufficient time to allow the SBEs to properly inquire about the project and respond to the solicitation, and will also review whether the bidder/offeree took appropriate steps to follow up with interested SBEs in a timely manner to facilitate participation by SBEs in the project;
2. Whether the bidder/offeree identified and broke up portions of work that can be performed by SBEs in order to increase the likelihood that SBEs would be able to participate, and the SBE goal could be achieved (e.g. breaking out contract items into economically feasible units to facilitate SBE participation, even when the bidder/offeree might otherwise prefer to perform these work items with its own forces);
3. Whether the bidder/offeree made available or provided interested SBEs with adequate information about the plans, specifications, and requirements of the project in a timely manner, and assisted them in responding to the bidder's/offeree's solicitation;
4. Whether the bidder/offeree negotiated in good faith with interested SBEs. Evidence of such negotiations includes documenting: a) the names, addresses, and telephone numbers of SBEs that were contacted by the bidder/offeree; b) a description of the information that was provided to SBEs regarding the plans and specifications; and c) detailed explanations for not utilizing individual SBEs on the project. The fact that there may be additional or higher costs associated with finding and utilizing SBEs are not, by themselves, sufficient reasons for a bidder's/offeree's refusal to utilize a SBE, or the failure to meet the SBE goal, provided that such additional costs are not unreasonable. Also, the ability or desire of a bidder/offeree to perform a portion of the work with its own forces, that could have been undertaken by an available SBE, does not relieve the bidder/offeree of the responsibility to make GFE to meet the SBE goal, and to make available and solicit SBE participation in other areas of the project to meet the SBE goal;
5. Whether the bidder/offeree rejected SBEs as being unqualified without sound reasons, or based on a thorough investigation of their capabilities. The SBE's standing within the industry, membership in specific groups, organizations, or associations, and political or social affiliation, are not legitimate bases for the rejection or non-solicitation of bids from particular SBEs;
6. Whether the bidder/offeree made efforts to assist interested SBEs in obtaining bonding, lines of credit, or insurance;
7. Whether the bidder/offeree made efforts to assist interested SBEs in obtaining necessary equipment, supplies, materials, or related assistance or services; and
8. Whether the bidder/offeree effectively used the services of available minority/women community organizations, minority/women business groups, small business

organizations/agencies, contractors' groups, local, state, and federal minority/women business assistance offices, or other organizations to provide assistance in recruitment and placement of SBEs.

It is the sole responsibility of the bidder/offeror to submit any and all documents, logs, correspondence, and any other records or information to HDOT that will demonstrate that the bidder/offeror made GFE to meet the SBE goal. Additionally, for each SBE that was contacted but not utilized by the bidder/offeror for a contract, the bidder/offeror shall submit a detailed written explanation for each SBE detailing the reasons for the bidder's/offeror's failure or inability to utilize, or to allow the SBE to participate in the contract. Further, when a bidder selects a non-SBE over a SBE subcontractor, documentation of GFE must include quotes of each SBE and non-SBE subcontractor submitted to the bidder for work on the contract. In its GFE evaluation, HDOT shall also consider the following as part of its evaluation:

1. Compare the bidder's/offeror's bid against the bids of other bidders/offerors on the same project, and compare the SBEs and SBE work areas utilized by the bidder/offeror with the SBEs listed in other bids submitted for the contract. If other bidders obtained SBEs in a particular work area in which the low bidder did not, the committee shall take this into consideration in its evaluation;
2. Verify contacts by bidders/offerors with SBEs; and
3. Compare the SBE and the categories of SBE work targeted by the bidder/offeror for participation in the contract, with the total pool of SBEs available for each particular subcontract targeted by the bidder.

#### Information Necessary to Evaluate Good Faith Efforts

Each solicitation for which a contract goal has been established for construction contracts will require the bidders/offerors to submit within five (5) days of bid opening:

1. SBE Confirmation and Commitment Agreement. This form must be **signed by the bidder/offeror and each SBE** subcontractor, manufacturer, supplier, or trucking company and submitted to the State Project Manager. Information to be provided on the form shall include, among other things, the project number, the SBE's NAICS codes, description of work, bid items with corresponding price information, prime contractor name and contact information SBE name and contact information and subcontractor name and contact information if the SBE is a second tier subcontractor.
2. SBE Contract Goal Verification and Good Faith Efforts (GFE) Documentation for Construction. List the dollar amount of all subcontractors, manufacturers, suppliers, and trucking companies (both SBE and non-SBE firms). Bidder/offeror must also list the SBE project goal on this form. Even if the bidder/offeror meets the SBE project goal, the bidder/offeror shall submit documentation of good faith efforts including quotations for both SBE and non-SBE subcontractors when a non-SBE is selected over a SBE for the project.

The above forms must be complete and provide the necessary information to properly evaluate bids/proposals. Failure to provide any of the above shall be cause for bid/proposal rejection.

### Administrative Reconsideration of Good Faith Efforts

- A. Within five (5) working days of being informed in writing by the Department that the bidder/offeror has not documented sufficient GFE, a bidder/offeror may request administrative reconsideration. Bidders/offerors should make this request in writing to the following official:

Director of Transportation  
Hawaii Department of Transportation  
869 Punchbowl Street, Room 509  
Honolulu, Hawaii 96813
- B. The reconsideration official, or his or her designee (referred to as “reconsideration official”), shall not have played any role in the original determination that the bidder/offeror failed to meet the goal or make adequate good faith efforts to do so.
- C. As part of this reconsideration, the bidder/offeror will have the opportunity to provide written documentation or argument concerning the issue of whether it met the goal or made adequate GFE to do so. The bidder/offeror will have the opportunity to meet in person with the reconsideration official to discuss the issue of whether it met the goal or made adequate GFE to do so.
- D. In an administrative reconsideration, the reconsideration official will review all previously submitted documents, oral and written arguments, and other evidence presented in the reconsideration, in making the decision.
- E. The Department shall inform the bidder/offeror of the decision within thirty (30) days of the proceeding. The decision will state the Department’s findings, and explain the basis of those findings, with respect to whether or not the bidder/offeror met the contract goal, or whether or not the bidder/offeror made adequate GFE to achieve the contract goal.
- F. The reconsideration decision is not administratively appealable to USDOT but is appealable under HRS 103D-709.

### Commercially Useful Function (CUF)

HDOT shall include provisions relating to the CUF of SBE firms, and any subsequent updates to these provisions, in the contract provisions relating to SBE requirements.

CUF is evaluated on a project by project basis. To determine whether a SBE is performing a CUF, HDOT shall evaluate the amount of work subcontracted to the SBE, industry practices,

whether the amount the firm is to be paid under the contract is commensurate with the work it is actually performing and the SBE credit claimed for its performance of the work, and other relevant factors. The SBE must perform at least thirty (30) percent of the work with its own forces.

When a SBE is presumed not to be performing a CUF, the SBE may present evidence to rebut this presumption. HDOT shall make the determination whether a SBE firm is performing a CUF given the type of work involved and normal industry practices.

HDOT's decision on CUF matters are subject to review by the concerned operating administration, but are not administratively appealable to USDOT.

### Monitoring CUF Performance

It shall be the prime contractor's responsibility to ensure that all certified SBEs selected to perform work on the contract and for which the prime contractor shall receive SBE credit, perform a CUF. HDOT shall conduct inspections at each project site whenever a SBE commences work to ensure that it is performing a CUF. On-site inspectors and/or project managers shall use the CUF SBE Onsite Review Form when a SBE starts work on the project. The CUF review may be performed more than once if HDOT has reason to believe that the SBE is no longer performing a CUF. All CUF forms shall be retained in the project files and a copy shall be sent to the DBELO.

When it is determined that an SBE is not performing a CUF, HDOT may consider imposing sanctions against the prime contractor such as, but not limited to, withholding progress payments, limiting credit towards the contract goal, or terminating the contract. Severity of sanction shall depend on the size of the contract, whether the prime contractor has had CUF or prompt payment issues in the past, or if subcontractors have been replaced or terminated on previous projects.

### Replacement of an SBE on a Project with a Contract Goal

HDOT shall follow §26.53 of the DBE Regulations when a prime contractor requests to replace an SBE on a project with a contract goal. This means the prime contractor must make adequate good faith efforts to replace an SBE with another SBE to the extent needed to meet the contract goal. Further, the prime contractor must request the replacement in writing, and must be approved by HDOT. The same process for replacing DBEs on a contract as specified in Section XI of the DBE Requirements (i.e. DBE Special Provisions) shall apply to SBEs.

There shall be no substitution or termination of an SBE subcontractor at any time without the prior written consent of HDOT. Written consent shall only be granted if the contractor has good cause, as specified in §26.53

### SBE Set-Asides

The objective of the SBE Set-Aside Program is to increase DBE participation on Federal

Highway Administration (FHWA) funded contracts through race- and gender-neutral measures. The overall DBE goal for FHWA is 17.26% for FFYs 2020 through 2022. The overall goal is based on demonstrable evidence of ready, willing and able DBEs relative to all businesses currently ready, willing and able to participate on HDOT's FHWA-assisted contracts.

HDOT shall implement a pilot program to establish small business set-asides<sup>2</sup> for Federal Highway Administration (FHWA) funded projects. Federal-aid contracts that are set-aside for SBEs shall be identified by the DBELO in coordination with the project engineer and FHWA representative. To the extent practicable, HDOT shall establish a process similar to the federal procurement system which allows for small business set-asides. Specifically, HDOT shall follow the Federal Acquisition Regulation (FAR) Part 19, Small Business Programs, and the Small Business Administration's Regulations (13 CFR 125) pertaining to set aside contracts for small businesses.

As set forth in the aforementioned FAR Part 19 and 13 CFR, Part 125, HDOT shall adopt the federal procurement system's "rule of two" which requires contracts to be set-aside when there is a "[r]easonable expectation that offers will be obtained from at least two small business concerns that are competitive in terms of quality and delivery and award will be made at fair market prices."<sup>3</sup> Notwithstanding this rule, an exception may be made when there is a single qualified bidder/offeror and selection of such bidder/offeror is in the best interest of the state.

The rule of two shall only apply to construction contracts, and the contract amount shall not exceed \$2 million. Contracts shall be solicited and procured through invitation for bids. For professional services contracts, HDOT proposes to set aside professional services contracts that do not exceed \$2 million, and shall only be set aside if there are at least three qualified SBE firms.

## Pilot Program Rollout and Training

The target date for launching the pilot program is estimated to be November 1, 2021. Prior to the start of the pilot program, HDOT's DBE staff, project design engineers and staff responsible for procurement of construction projects and construction-related professional services shall receive training to identify the type, size, and scope of contracts that may be set-aside for SBEs. After all HDOT staff have been trained, a committee will select the projects to be set-aside, based on specific criteria identified in HDOT's Small Business Utilization Plan.

Informational briefings shall be conducted for all certified DBEs and SBEs, as well as the small businesses registered in the state's small business database. Businesses that are not yet certified as a DBE and/or SBE shall be contacted by HDOT's DBE staff and encouraged to apply for certification through HDOT's online certification system. This will increase the pool of

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<sup>2</sup> To help provide a level playing field for small businesses, HDOT seeks to limit competition for certain contracts to small businesses. Those contracts are called "small business set-asides," and they help small businesses compete for and obtain federal contracts.

<sup>3</sup> 13 CFR Part 125, §125.22

businesses from which HDOT may consider for the pilot program.

HDOT DBE Program Office shall conduct training for SBEs to assist in the transition from subcontracting work to prime contracting. This will be done by coordinating such training with HDOT's resource partners such as the U.S. Small Business Administration, and the Minority Business Development Agency.

# ATTACHMENT F



**State of Hawaii**  
**Department of Transportation**  
**Disadvantaged Business Enterprise Program**  
**Procedures Regarding HDOT Proposal to**  
**Remove DBE Eligibility**



**Objective:**

When Hawaii Department of Transportation (HDOT) has determined a Disadvantaged Business Enterprise (DBE) no longer qualifies under the certification requirements of Title 49, Code of Federal Regulations, Part 26 (49 CFR 26), the DBE is given the opportunity to respond to HDOT's proposal utilizing the following fair, uniform and consistent procedures.

**I. DBE Opportunity to Respond to Decertification Proposal**

When HDOT determines that there is reasonable cause to believe that a DBE is ineligible to be certified and proposes in writing to remove the DBE's eligibility, the DBE is afforded an opportunity to respond in accordance with 49 CFR §26.87(d). The DBE may take one of two actions if they are contesting the basis for the decertification: 1) request an informal hearing, or 2) submit a written response to the decertification proposal.

**a. Informal Hearing Procedures**

The DBE may respond to the reasons for the proposal to remove its eligibility in person and provide information and arguments concerning why it should remain certified at an informal hearing.

To help ensure the safety and well-being of those involved in the informal hearing, HDOT is adopting the guidance provided by the United States Department of Transportation (USDOT). Therefore, the informal hearing may be conducted by utilizing a computer, tablet, and mobile technologies, such as FaceTime, Skype, GoToMeeting, Zoom, and other similar telecommunication applications.

The informal hearing will be scheduled within 30 days from the date of the DBE's written request. Upon good cause presented to the Hearing Officer (HO), at the discretion of the HO, a one time extension of 30 days may be given. Any additional extensions shall only be granted under extreme or extenuating circumstances at the discretion of the HO. If an extension request is not approved by the HO for good cause, the DBE will be required to attend the informal hearing as scheduled. Should the DBE fail to participate at the informal hearing, HDOT will remove the firm's eligibility due to the DBE's failure to cooperate. Should the DBE choose to not attend any of the pre-hearing conferences with the HO, once notice is given of the hearing date and time, the DBE will be deemed to have waived their presence at the conference.

**1) HDOT shall retain the original DBE file and provide copies to:**

**a. DBE (upon request);**

- b. State of Hawaii, Attorney General's Office; and
- c. HO.

The file shall contain, at a minimum, a table of contents, relevant documents which HDOT used to determine eligibility, and all correspondence. Each page of each copy of the file shall be Bates Stamped or numbered for reference during the hearing.

- 2) HDOT will charge the DBE for any cost of copying the record. HDOT personnel shall charge not less than twenty-five (25) cents per page, sheet, or fraction thereof, for copies of government records. HDOT may also charge fees for the time spent searching, reviewing, and segregating government records in accordance with rules adopted by the Office of Information Practices.
- 3) The following steps will be taken to secure hearing venue by HDOT:
  - a. Check conference rooms at HDOT for availability.
  - b. If the HO is from out-of-state, arrangements shall be made for a videoconference at HDOT.
  - c. A court reporter will be retained to obtain a verbatim record of an administrative hearing.
- 4) HDOT will respond in writing to the DBE's request for an informal hearing (emails are acceptable if agreeable by the DBE). The letter will inform the DBE of the date, time, and location of hearing.
- 5) HDOT will provide a copy of the documents/evidence that it intends to provide to the HO at least 10 days prior to the hearing. HDOT will provide to the DBE, the names and contact information (phone numbers and emails) of all witnesses they intend to call as witnesses during the hearing.
- 6) The DBE will provide to HDOT, all documents and records they intend to provide at the hearing to the HO at least 10 days BEFORE the commencement of the hearing. If the DBE does not do so, it is deemed that they waive to present that evidence at the hearing. Otherwise, in extenuating circumstances, a request to the HO may be made for an extension of the time for the hearing until the documentation/evidence is provided to HDOT. Only one extension of 10 days may be given to the DBE. The DBE will also provide HDOT with any witnesses and their contact information (phone numbers and email addresses) within 10 days of the request for hearing. If the DBE does not do so within 10 days of the hearing, the witness may be precluded from testifying at the hearing. HDOT will provide to the DBE any witnesses they intend to call within 10 days of the hearing. If HDOT does not do so within 10 days of the hearing, the HDOT witness may be precluded from testifying at the hearing. The HO will have the discretion to require additional procedures and will inform HDOT and the DBE as soon as practicable.

- 7) The HO shall be a person who is knowledgeable about the certification requirements of the DBE program and also will NOT be the Civil Rights Coordinator or his/her designee from HDOT's Office of Civil Rights. Such an individual shall have not participated in any certification decisions affecting the requesting DBE and shall be knowledgeable about the DBE certification requirements. If a HO official is not available or does not possess the requisite knowledge of the DBE program, a representative from a Unified Certification Program in another state will serve as the HO. HDOT will maintain a record of the process, including a verbatim record.
- 8) HDOT will notify the out-of-state HO of the date, time (remember the time zone) and videoconference site. A copy of the complainant's entire DBE certification record shall be sent to the HO. A copy of what is provided to the HO will also be provided to the DBE at least 10 days prior to the hearing.
- 9) At the time of the hearing, the DBE will have an opportunity to present evidence to refute the decertification proposal. The DBE may respond to the reasons for removal of its eligibility and provide information and arguments concerning why the DBE should remain certified.

**Order of Hearing:**

1. HDOT bears the burden of proving by a preponderance of the evidence that the DBE does not meet the certification standards of 49 CFR Part 26.
2. The HO shall initiate the hearing and explain the procedure to be followed.
  - (a) The reason for the informal hearing and name of the DBE owner shall be read into the record. A transcriber/electronic record of the proceeding shall be made and retained by the State of Hawaii. A court reporter will be retained for a verbatim record.
3. The HO shall call upon HDOT to provide a brief presentation (no more than 15 minutes) outlining the reasons why the DBE is not eligible to remain certified as a DBE. HDOT will make a brief presentation (no more than 15 minutes) to explain HDOT's position and reasons for its proposal to remove the DBE's eligibility.
4. HDOT shall present documents, evidence, and/or call witnesses addressing issues outlined in HDOT's proposal to decertify the DBE.
5. HDOT shall present their case to the HO and the DBE may have an opportunity to cross-examine the witnesses.
6. At the end of HDOT's presentation, the DBE will present their case to the HO and HDOT may have an opportunity to cross-examine the witnesses. The DBE may present documents, evidence, and/or call witnesses to address other issues relevant to the removal of its eligibility under 49 CFR Part 26.

7. The HO may question either HDOT, the DBE, or their witnesses at any time during the hearing.
8. On conclusion of the question period, HDOT followed by the DBE shall be given the opportunity to present a rebuttal case.
9. The HO shall proceed to develop findings of fact and or conclusions of law with regard to the eligibility of the DBE to remain certified under the provisions of 49 CFR Part 26 within 30 days of the informal hearing. HDOT shall forward the findings of fact and or conclusions of law to the DBE with a cover letter explaining the conclusions and its impacts and appeal rights if appropriate.
10. The decision by the HO shall be based on any one or more of the following:
  - (a) Changes in the DBE's circumstances since the certification of the DBE by HDOT that rendered the DBE ineligible pursuant to 49 CFR, Part 26;
  - (b) Receipt of information or evidence not available to HDOT at the time of certification;
  - (c) Receipt of information that was concealed or misrepresented before or during certification proceedings;
  - (d) Changes in the certification standards or requirements of the U.S. Department of Transportation since HDOT certified the DBE;
  - (e) A document finding that HDOT's determination to certify the DBE was factually erroneous.
  - (f) The DBE has failed to cooperate with HDOT; or
  - (g) The DBE has exhibited a pattern of conducting indicating its involvement in attempts to subvert the intent or the requirements of the DBE program.

While an informal hearing decision is pending, the DBE is eligible to participate on federally funded projects.

b. Written Response

The DBE may elect to present information and arguments in writing, without going to a hearing, within ten (10) calendar days from the date of the proposal letter. The request must set forth in detail the reasons the DBE believes HDOT's proposal is in error and must include any additional information and arguments concerning why the DBE should remain certified. The information and arguments will be duly submitted to an impartial third party hearing officer, not within the HDOT, Office of Civil Rights.

## **II. DBE Right to Appeal**

The final decision must inform the DBE of the consequences and of the availability of an appeal to the U.S. Department of Transportation under 49 CFR §26.89. The DBE must appeal within 90 days of HDOT's final decision. Copies of the decision shall be sent via certified

mail to the DBE owner and the original shall be retained in HDOT's DBE certification file.  
Note: If there is an appeal to USDOT under 49 CFR §26.89, HDOT will provide a transcript of the hearing to USDOT and to the DBE, upon request. If the DBE does not submit an appeal, the decision by the HO shall be final and the DBE will have no further appeal rights.

# ATTACHMENT G

**ATTACHMENT G - HAWAII DEPARTMENT OF TRANSPORTATION (HDOT)  
DISADVANTAGED BUSINESS ENTERPRISE (DBE)  
COMPLAINT PROCEDURES**

Purpose: The attached form is for use by any affected business or person who believes that a recipient, subrecipient, or business failed to carry out its obligations pursuant to the requirements of 49 CFR Part 23 and/or 49 CFR Part 26 (or other related statutes, contract, or subcontract). The HDOT DBE complaint process provides a means to submit allegations of noncompliance regarding matters believed to be the responsibility of a recipient, subrecipient, or business. Such allegations include, but are not limited to, procedural deficiencies, prompt payment, or other activities believed to be in violation of the DBE requirements.

Filing Instructions: All complaints must be filed no later than 180 days from the date of the alleged violation of 49 CFR Part 23 and/or 49 CFR Part 26 (or other related statute, contract, or subcontract). If you need assistance in completing the complaint form or require it in an accessible format, including any other language, please contact the HDOT Office of Civil Rights (OCR) at (808) 831-7901. Please send the signed complaint form along with the attached “COMPLAINANT CONSENT/RELEASE FORM” (pages 1-3) via email to HDOT-DBE@hawaii.gov, or regular mail to:

Hawaii State Department of Transportation  
Office of Civil Rights  
Attention: DBE Program Supervisor  
200 Rodgers Boulevard  
Honolulu, HI 96819

These procedures do not deny or limit the right of a complainant to file a formal complaint with the U.S. Department of Transportation (USDOT).

Disposition of Complaints: Complaints should contain specific information to support each allegation. Any complaint that, on its face, lacks evidence supporting the allegations may be dismissed or held until additional information is obtained from the Complainant. Upon review of each complaint received by the HDOT OCR, the following actions will be taken, as appropriate:

- Notify Complainant of acceptance, dismissal, or make request for additional information;
- Notify Complainant of lack of jurisdiction and transfer the complaint to another government agency;
- Notify the Complainant of referral to the appropriate operating administration; and
- Where the HDOT OCR has completed an investigation, the Complainant and Respondent will be notified by letter.

Confidentiality: The HDOT OCR will protect the identity of Complainants to the maximum extent possible by law. Any individual filing a complaint may request to remain anonymous by indicating so in the attached “COMPLAINANT CONSENT/RELEASE FORM”; however, doing so may impede the completion of an investigation and resolution of any matters in which the Complainant or the FHWA hold interest.

## HDOT DBE PROGRAM COMPLAINT FORM

1. Name of recipient, subrecipient, or business:

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2. State or Federal Project number and description of project on which alleged violation(s) occurred:

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### 3. Complaint Description

Check one or more boxes, indicating the area(s) of concern:

- ☐ Good Faith Effort Determinations (pre-award/post-award)
- ☐ Goal-setting
- ☐ Monitoring and Enforcement of Commercially Useful Function
- ☐ Counting/Crediting of DBE Participation
- ☐ Termination (including substitution or modification of work under commitment)
- ☐ Prompt Payment/Return of Retainage
- ☐ Eligibility
- ☐ Suspected Fraud or Criminal Activity
- ☐ Other (e.g. Discriminatory action based on race, sex, color, or national origin)

Please list below each allegation, including essential elements of information (who, what, where, when). Provide the date of each occurrence and describe how it violates the requirement(s). Attach any evidence or documentation supporting your claim(s). If you need additional space, you may do so on a separate page (attach to this document).

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[illegible]

Complainant (Name and Title/Company Name):

Address:

City:

State:

Zip:

Telephone:

Fax:

E-Mail:

By:

(Signature)

(Date)

**Office Use Only**

Date received by HDOT:

Complaint Number:

Date Received and Initials:

### Action Taken

- ☐ Complaint Accepted
- ☐ Complaint Incomplete/Requested additional information
- ☐ No Jurisdiction
- ☐ No Jurisdiction with referral to another government agency
- ☐ Referred to appropriate operating administration
- ☐ Other:

## HDOT COMPLAINANT CONSENT/RELEASE FORM

Complainant (Name and Title/Company Name):

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Address:

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State or Federal Project number and description of project:

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Please read the information below, check the appropriate box, and sign this form.

I have read the Notice of Investigatory Uses of Personal Information. As a complainant, I understand that in the course of an investigation it may become necessary for HDOT to reveal my identity to persons at the organization or institution under investigation. I am also aware of the obligations of HDOT to honor requests under the Freedom of Information Act. I understand that it may be necessary for HDOT to disclose information, including personally identifying details, which it has gathered as a part of its investigation of my complaint. In addition, I understand that as a complainant I am protected by USDOT's regulations from intimidation or retaliation for having taken action or participated in action to secure rights protected by nondiscrimination statutes enforced by the USDOT.

### CONSENT/RELEASE

- ☐ CONSENT - I have read and understand the above information and authorize HDOT to reveal my identity to persons at the organization or institution under investigation. I hereby authorize HDOT to receive material and information about me pertinent to the investigation of my complaint. I understand that the material and information will be used for authorized civil rights compliance and enforcement activities. I further understand that I am not required to authorize this release, and do so voluntarily.
- ☐ CONSENT DENIED - I have read and understand the above information and do not want HDOT to reveal my identity to the organization or institution under investigation, or to review, receive copies of, or discuss material and information about me, pertinent to the investigation of my complaint. I understand this is likely to impede the investigation of my complaint and may result in the closure of the investigation.

Signature:

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Date:

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## **NOTICE ABOUT INVESTIGATORY USES OF PERSONAL INFORMATION**

### **NOTICE OF COMPLAINANT/INTERVIEWEE RIGHTS AND PRIVILEGES**

Complainants and individuals who cooperate in an investigation, proceeding, or hearing conducted by HDOT are afforded certain rights and protections. This brief description will provide you with an overview of these rights and protections.

- A recipient may not force its employees to be represented by the recipient's counsel nor may it intimidate, threaten, coerce, or discriminate against any employee who refuses to reveal to the recipient the content of an interview. An employee does, however, have the right to representation during an interview. The representative may be the recipient's counsel, the employee's private counsel, or anyone else the interviewee authorizes to be present.
- The laws and regulations provide that no recipient, contractor, or any other participant in the DBE program shall intimidate, threaten, coerce, or discriminate against any individual or firm because the individual or firm has made a complaint, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing.
- Information obtained from the complainant or other individual which is maintained in HDOT's investigative files may be exempt from disclosure under the Freedom of Information Act, the Uniform Information Practices Act, or the Hawaii Privacy Law if release of such information would constitute an unwarranted invasion of personal privacy.

There are three laws governing personal information submitted to HDOT: the Freedom of Information Act (5 U.S.C. ' 552), the Uniform Information Practices Act (HRS Chapter 92F), and the Hawaii Privacy Law (HRS §711-1111).

THE FREEDOM OF INFORMATION ACT gives the public access to certain files and records of HDOT. Individuals can obtain items from many categories of records of HDOT -- not just materials that apply to them personally. HDOT must honor requests under the Freedom of Information Act, and also Disclosure of Personal Records under HRS §92F, with some exceptions. HDOT generally is not required to release documents during an investigation or enforcement proceedings if the release could have an adverse effect on the ability of the agency to do its job. Also, HDOT may refuse a request for records compiled for law enforcement purposes if their release could be an "unwarranted invasion of privacy" of an individual. Requests for other records, such as personnel and medical files, may be denied where the disclosure would be a "clearly unwarranted invasion of privacy."

THE UNIFORM INFORMATION PRACTICES ACT is intended to open up governmental processes to public scrutiny and participation by requiring government business to be conducted as transparently as possible, while balancing personal privacy rights guaranteed under the Hawaii State Constitution

THE HAWAII PRIVACY LAW is intended to protect an individual's right to privacy, except in the execution of public duty or as authorized by law.

Persons who submit information to HDOT should know that:

- HDOT is required to investigate complaints of discrimination on the basis of race, color, national origin, sex, disability, age, and, in some instances, religion against recipients, contractors, or any other participants in the DBE program. HDOT also is authorized to conduct reviews of recipients, contractors, or any other participants in the DBE program to assess their compliance with civil rights laws.
- Information that HDOT collects is analyzed by authorized personnel within the agency. This information may include personnel records or other personal information. HDOT staff may need to reveal certain information to persons outside HDOT in the course of verifying facts or gathering new facts to develop a basis for making a civil rights compliance determination. Such details could include the physical condition or age of a complainant. HDOT also may be required to reveal certain information to any individual who requests it under the provisions of the Freedom of Information Act.
- Personal information will be used only for the specific purpose for which it was submitted, that is, for authorized civil rights compliance and enforcement activities. HDOT will not release the information to any other agency or individual unless the person who supplied the information submits a written consent, with some exceptions. One of these exceptions is when release is required under the Freedom of Information Act.
- No law requires a complainant to give personal information to HDOT, and no sanctions will be imposed on complainants or other individuals who deny HDOT's request. However, if HDOT fails to obtain information needed to investigate allegations of discrimination, it may be necessary to close the investigation.
- HDOT does not reveal the names or other identifying information about an individual unless it is necessary for the completion of an investigation or for enforcement activities against a recipient that violates the laws, or unless such information is required to be disclosed under the Freedom of Information Act. HDOT will keep the identity of complainants confidential except to the extent necessary to carry out the purposes of the civil rights laws, or unless disclosure is required under the Freedom of Information Act or otherwise required by law.